IN THE

Supreme Court of the United States,

OCTOBER TERM, 1918
No. 664.

THE HEBE COMPANY and CARNATION MILK PRODUCTS COMPANY, CORPORATIONS,

Plaintiffs in error,

vs.

NORMAN E. SHAW, SECRETARY OF AGRICULTURE OF OHIO, THOMAS C. GAULT, CHIEF OF BUREAU OF DAIRY and FOODS OF THE BOARD OF AGRICULTURE OF OHIO, and OTHER OFFICERS and AGENTS CLAIMING TO ACT UNDER THE AUTHORITY OF SAID THE BOARD OF AGRICULTURE OF OHIO, OR OF THE SECRETARY OF AGRICULTURE OF OHIO,

Defendants in error.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES, SOUTHERN DISTRICT OF OHIO, EASTERN DIVISION.

Brief and Argument for Appellants.

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Subject Index.

CASES.

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BRIEF AND ARGUMENT FOR APPELLANTS.

Statement of the Case.

This is a bill for injunction filed by appellants to enjoin certain officers of Ohio from prohibiting the sale of "Hebe" in that state.

"Hebe" is sold by appellants in most of the States of the Union. It is a food product which is a compound of skimmed milk and cocoanut oil, the finished product "Hebe" consisting of evaporated skimmed milk and about six per cent. of cocoanut oil. It contains no other ingredients, and is a wholesome article of food, containing nothing of a deleterious nature. (*Opinion*, District Court Rec., p. 38.)

"Hebe" is manufactured by appellants in plants located in Wisconsin and elsewhere, but none of it is manufactured in Ohio. In the course of interstate commerce appellants sell "Hebe" to wholesale dealers, jobbers and distributors, and these latter sell in turn to retail dealers and others, and the retailers sell to the consumer.

The stipulation with respect to the course of trade is as follows (Rec. pp. 49, 50):

> "3. Plaintiffs are engaged in manufacturing and selling outside of the State of Ohio, and shipping to the State of Ohio, the food product described in the bill of complaint filed herein.
>
> "4. Plaintiffs do business in said food product with wholesale dealers, jobbers and distributors, residing and doing business in the State of Ohio.
>
> "5. Plaintiffs receive orders for said food product from said wholesale dealers, jobbers and distributors in the State of Ohio, and then fill said orders by shipping said product from plaintiffs' places of business outside of the State of Ohio to said wholesale dealers, jobbers and distributors in the State of Ohio; and said wholesale dealers, jobbers and distributors then sell said product to retail dealers (and in some instances directly to large consumers such as restaurants and hotels) in the State of Ohio; and said retail dealers sell the said food product direct to consumers in

the State of Ohio, and offer it for sale to consumers, and expose it for sale to consumers, and have it in their possession with intent to sell to consumers, in the said State of Ohio, (the place of acceptance by plaintiffs of said orders may be established by oral proof)."

It was also stipulated (Rec. pp. 65, 66):

"that when 'Hebe' is shipped into Ohio in less than carload lots, said fibre shipping cases are marked only with the name of the consignee and such other data as is necessary to insure proper identification of the product and delivery of the shipment; but that when shipped in carload lots such cases are not marked with the name of the consignee; that when said shipping cases are received by a retail dealer in the State of Ohio, the individual cans, labeled with the label shown by the bill of complaint, are removed from said shipping cases by such retail dealer and exposed for sale on the shelves of said retail dealer as individual units, and in the great majority of instances are purchased by consumers one can at a time."

Both the large and small size tin cans bear a uniform label as shown below:

NET CONTENTS 1 LB AVOIRDUPOIS

HEBE

A COMPOUND OF EVAPORATED SKIMMED MILK AND VEGETABLE FAT

CONTAINS 6% VEGETABLE FAT.
24% TOTAL SOLIDS.

MANUFACTURED AT JEFFERSON, WIS.

THE HEBE COMPANY

GENERAL OFFICES: SEATTLE, WASH.

PATENT APPLIED FOR

FOR COFFEE AND CEREALS
FOR BAKING AND COOKING

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"Hebe" was first introduced into Ohio early in 1915. At that time a label was used differing somewhat from the present label. Appellees' predecessors in office raised certain objections to the form of the label at that time, and to meet these objections the present label was adopted and was afterwards formally approved by the appellees' predecessors in office. (Rec. pp. 10, 11.)

Relying upon the approval of the label, appellants began at once to extend vigorously the sale of "Hebe" in Ohio and had succeeded in building up a large business therein, when the further sale of the product was absolutely prohibited by the appellees.

Section 12725 of the General Code of Ohio reads as follows:

> "Section 12725. Whoever manufactures, sells, exchanges, exposes or offers for sale or exchange, condensed milk unless it has been made from pure, clean, fresh, healthy, unadulterated and wholesome milk, from which the cream has not been removed and in which the proportion of milk solids shall be the equivalent of twelve per cent. of milk solids in crude milk twenty-five per cent of such solids being fat, and unless the package, can or vessel containing it is distinctly labeled, stamped or marked with its true name, brand, and by whom and under what name made, shall be fined not less than fifty dollars nor more than two hundred dollars, and, for each subsequent offense, shall be fined not less than one hundred dollars nor more than five hundred dollars and imprisoned not less than ten days nor more than ninety days."

The appellees construe the above section to apply to "Hebe" and insist that under this statute "Hebe" cannot be lawfully sold in Ohio.

There are other sections of the Ohio Code to which the District Court referred in its Opinion

(Rec. pp. 39, 40), and which we will discuss briefly later, but Section 12725 is the section upon which the appellees relied on the trial of the case, and upon which the Court based its Opinion and Decree.

Appellants filed their bill of complaint, asking an injunction against appellees to restrain them from interfering with the sale of "Hebe" in Ohio. The bill alleges that Section 12725 of the General Code of Ohio (and no other statute of that State) when properly construed does not apply to a product like "Hebe", plainly labeled to show its true character and composition; that if said section can be so construed it is unconstitutional and void as amounting to an unwarrantable prohibition of the sale of a wholesome article of food and not a mere regulation within the power of the State; that appellants in shipping "Hebe" into Ohio and their customers in selling said product are under the protection of the interstate commerce clause of the Constitution of the United States; that the Federal Food and Drugs Act controls shipments in interstate commerce and the sale in the original package, as therein defined, of products so shipped; that "Hebe" when shipped into Ohio and sold there complies in all respects with the Federal Food and Drugs Act and is lawfully sold in the original packages; and that the said Section 12725 of the General Code of Ohio if construed to apply to the sale of "Hebe" is unconstitutional and void, because said section so construed is arbitrary, unduly discriminatory and confiscatory, deprives the appellants of their property without due process of law and denies them the equal protection of the laws in violation of the Fourteenth Amendment of the Constitution of the United States (Rec. pp. 14-17).

The defendants admit that unless restrained

"they will arrest, cause to be arrested and prosecute or assist in arresting and prosecuting, each and all of the customers of plaintiffs who may sell, exchange, expose or offer for sale or exchange" the said product (Rec. pp. 25-26).

Upon final hearing appellants' bill was dismissed. In dismissing the bill the court filed an opinion upholding the construction of said Section 12725 contended for by appellees and sustaining the constitutionality of said section as so construed. As the constitutional questions were involved, appeal lies directly to this court (Judicial Code, Sec. 238) and the entire case is here. *Towne* v. *Eisner*, 245 U. S., 418, 426. The evidence consisted of oral testimony taken in open court and various exhibits, all of which are preserved in the record by a certificate of evidence.

The appellants assign as error the action of the court in dismissing their bill of complaint. A specification of the errors relied upon is as follows (Rec. pp. 30-34):

Errors Relied Upon.

I.

The court erred in that in and by said decree it dismissed the plaintiffs' bill of complaint.

II.

The court erred in that in and by said decree it holds that Section 12725 of the General Code of the State of Ohio prohibits the sale of the compound "Hebe" in the State of Ohio.

III.

The court erred in that in and by said decree it holds that the laws of the State of Ohio prohibit the sale of the compound "Hebe" in the State of Ohio.

IV.

The court erred in that although in and by said decree it holds that Section 12725 of the General Code of the State of Ohio prohibits the sale of the compound "Hebe" in the State of Ohio, it failed to hold in and by said decree that said Section 12725, so construed, is in violation of the Fourteenth Amendment to the Constitution of the United States in that said Section 12725 deprives the plaintiffs of liberty and property without due process of law, and denies to the plaintiffs equal protection of the law.

V.

The court erred in that although in and by said decree it holds that the laws of the State of Ohio prohibit the sale of the compound "Hebe" in the State of Ohio, it failed to hold in and by said decree that said laws of the State of Ohio, so construed, are in violation of the Fourteenth Amendment to the Constitution of the United States, in that said laws deprive the plaintiffs of liberty and property without due process of law and deny to the plaintiffs the equal protection of the law.

VI.

The court erred in that although in and by said decree it holds that Section 12725 of the General Code of the State of Ohio prohibits the sale of the compound "Hebe" in the State of Ohio, it failed to hold in and by said decree that said Section 12725, so construed, arbitrarily and unjustly discriminates against said compound "Hebe" by prohibiting the distribution and sale thereof under a conspicuous label which shows the true character of said product, such prohibition being based upon the ground that said product "Hebe" is composed in part of condensed or evaporated skimmed milk, while at the same time the laws of the State of Ohio permit the sale without restriction of uncondensed or unevaporated skimmed milk if the same be labeled "skimmed milk" as the same is specified by said laws, and that by reason of such arbitrary and unjust discrimination said Section 12725 is in

violation of the Fourteenth Amendment of the Constitution of the United States in that it deprives the plaintiffs of liberty and property without due process of law and denies to the plaintiffs the equal protection of the law.

VII.

The court erred in that although in and by said decree it holds that the laws of the State of Ohio prohibit the sale of the compound "Hebe" in the State of Ohio, it failed to hold in and by said decree that said laws of Ohio so construed arbitrarily and unjustly discriminate against said compound "Hebe" by prohibiting the distribution and sale thereof under a conspicuous label, which shows the true character of said product, such prohibition being based upon the ground that said product "Hebe" is composed in part of condensed or evaporated skimmed milk, while at the same time the laws of the State of Ohio permit the sale without restriction of unevaporated or uncondensed skimmed milk if the same be labeled "skimmed milk", as specified by said laws, and that by reason of such arbitrary and unjust discrimination said laws of the State of Ohio are in violation of the Fourteenth Amendment of the Constitution of the United States in that they deprive the plaintiffs of liberty and property without due process of law and deny to the plaintiffs the equal protection of the law.

VIII.

The court erred in that although in and by said decree it holds that Section 12725 of the General Code of Ohio prohibits the sale of the compound "Hebe" in the State of Ohio, notwithstanding the fact that said "Hebe" is a pure and wholesome food product and is sold under a label describing such product, it failed to hold in and by said decree that said Section 12725, so construed, is in violation of the Fourteenth Amendment of the Constitution of the United States in that said Section 12725 deprives the plaintiffs of liberty and property without due process of law and denies to the plaintiffs the equal protection of the law.

IX.

The court erred in that although in and by said decree it holds that the laws of the State of Ohio prohibit the sale of the compound "Hebe" in the State of Ohio, notwithstanding the fact that said "Hebe" is a pure and wholesome food product and is sold under a label clearly describing said product, it failed to hold in and by said decree that such laws of Ohio, so construed, are in violation of the Fourteenth Amendment of the Constitution of the United States in that said laws deprive the plaintiffs of liberty and property without due process of law and to deny the plaintiffs the equal protection of the law.

X.

The court erred in that in and by said decree, it failed to hold that under the laws of the United States governing the shipment of food and drug products in interstate shipments, known as The Food and Drugs Act, approved June 30th, 1906 (34 U. S. Statutes at Large, page 768), the product "Hebe" labeled as set forth in the bill of complaint and as proved upon the trial of this cause, may be lawfully shipped by plaintiffs into the State of Ohio from without the State of Ohio, and that the plaintiffs and their customers and dealers in the State of Ohio may lawfully sell the same in that state in the original and individual cans in which the plaintiffs ship the said product into the State of Ohio.

XI.

The court erred in that it failed to hold in and by said decree that any prohibition in said Section 12725 of the General Code of Ohio of the right of the plaintiffs and their customers and dealers in the State of Ohio to sell the product "Hebe" in the original and individual cans in which the plaintiffs ship the product into the State of Ohio from without the State of Ohio, in the manner described in the plaintiffs' bill of complaint and as proved upon the trial of this case, is an unlawful interfer-

ence with the Interstate Commerce Laws of the United States.

XII.

The court erred in that in and by said decree it failed to hold that any prohibition in the laws of the State of Ohio of the right of the plaintiffs and their customers and dealers in the State of Ohio to sell the product "Hebe" in the original cans in which the plaintiffs shipped the product into the State of Ohio from without the State of Ohio in the manner described in plaintiffs' bill of complaint and proved upon the trial of this cause, is an unlawful interference with the Interstate Commerce Laws of the United States.

XIII.

The court erred in that in and by said decree it failed to hold that the original and individual cans in which the plaintiffs ship the said product "Hebe" into the State of Ohio from without the State of Ohio in the manner described in the plaintiffs' bill of complaint and as proved upon the trial of this cause, said cans being labeled as required by the National Food and Drugs Act, approved June 30th, 1906, (34 U. S. Statutes at Large, page 768) are the original packages within the meaning, intent and effect of said National Food and Drugs Act; and that any prohibition in the laws of the State of Ohio of the right of plaintiffs and their customers and dealers in the State of Ohio to sell the product "Hebe" in such original and individual cans is in violation of said National Food and Drugs Law, and such laws of Ohio are unconstitutional and void in that they are in conflict with said National Food and Drugs Law and the national regulations duly and regularly made thereunder.

XIV.

The court erred in that in and by said decree it failed to hold that Section 12725 of the General Code of Ohio prohibiting the sale by the plaintiffs

and their customers and dealers of the product "Hebe" in the State of Ohio is void because the same is unjust, arbitrary, unduly discriminating and confiscatory.

BRIEF OF ARGUMENT.

I.

The food product "Hebe," being a pure and wholesome product, plainly and fairly labeled, is not within the condemnation of the legislation of the State of Ohio, and may be lawfully sold in said State.

United States v. *Frank*, 189 Fed. 195, 198.

Caha v. *United States*, 152 U. S. 211, 221.

Hutchinson Ice Cream Co. v. *Iowa*,

Crowl v. *Commonwealth of Pennsylvania*, 242 U. S. 153.

Commonwealth v. *Boston White Cross Milk Co.*, 209 Mass. 30.

Genesee Valley Milk Products Co. v. *J. H. Jones Corporation*, 143 App. Div. (N. Y.) 624, 626, 627.

State v. *Crescent Creamery Co.*, 83 Minn. 284.

Rose v. *State*, 11 Ohio Civ. Ct. Rep. 87, 1 Ohio C. D. 72.

The J. M. Scaltz Company v. *The State of Ohio*, decided by Ct. of Appeals for Allen County, Ohio, December 28, 1917.

The statute in question is a penal statute and it should not be extended by construction.

Bolles v. *Outing Company*, 175 U. S. 262, 265.

Commonwealth v. *Boston White Cross Milk Co.*, *supra*.

The statute does not embrace a compound such as "Hebe."

Hutchinson Ice Cream Co. v. *Iowa*, *supra*.

II.

If the legislation in question can be deemed to be applicable, the prohibition of the sale of this product in Ohio is an unconstitutional interference with interstate commerce. The appellants are entitled to be protected against interference with sales in the original packages. The prohibition of the statute is repugnant to the Federal Food and Drugs Act.

Savage v. *Jones*, 225 U. S., 501, 519, 520.

Schollenberger v. *Pennsylvania*, 171 U. S., 1.

Collins v. *New Hampshire*, 171 U. S., 30.

Brown v. *Maryland*, 12 Wheaton, 419.

Leisy v. *Hardin*, 135 U. S. 100.

Rhodes v. *Iowa*, 170 U. S. 412, 424.

May v. *New Orleans*, 178 U. S. 496.

Austin v. *Tennessee*, 179 U. S. 343.

Gulf, Colorado & Santa Fe R'way Co. v. *Hefley*, 158 U. S., 98.

Northern Pacific Railway Co. v. *Washington*, 222 U. S., 370, 378.

Erie R. R. Co. v. *New York*, 233 U. S., 671, 683.

McDermott v. *Wisconsin*, 228 U. S., 115, 132-137.

Corn Products Refining Co. v. *Weigle*, 221 Fed., 998.

United States v. *779 Cases of Molasses*, 174 Fed. 325.

Courtice Brothers Co. v. *Weigle*, District Court of U. S. Western District of Wisconsin, decided October 30, 1916.

III.

The prohibition by the legislation in question, as construed by the court below, of the sale within the State of Ohio of this product, concededly pure, wholesome and nutritious, is invalid as a deprivation of liberty and property, and a denial of the equal protection of the laws, contrary to the Fourteenth Amendment.

Allgeyer v. *Louisiana*, 165 U. S., 578, 589.

Adams v. *Tanner*, 244 U. S., 590.

Powell v. *Pennsylvania*, 127 U. S., 678.

Price v. *Illinois*, 238 U. S., 446.

Armour v. *North Dakota*, 240 U. S., 510.

People v. *Biesecker*, 169 N. Y., 53.

The Toledo, Wabash and Western Railway Co. v. *City of Jacksonville*, 67 Ill., 37.

State v. *Hanson*, 118 Minn., 85.

Ex-parte Hayden, 147 Cal. 649.

Rigbers v. *Atlanta*, 7 Ga. App., 411.

Dorsey v. *Texas*, 38 Tex. Crim. Rep. 527, 40 L. R. A. (Texas Ct. App., 201)).

People v. *Excelsior Bottling Works*, 184 App. Div. (N. Y.) 45.

Waite v. *Macy*, 246 U. S., 606.

ARGUMENT.

I.

THE FOOD PRODUCT "HEBE," BEING A PURE AND WHOLESOME PRODUCT, PLAINLY AND FAIRLY LABELED, IS NOT WITHIN THE CONDEMNATION OF THE LEGISLATION OF THE STATE OF OHIO, AND MAY BE LAWFULLY SOLD IN SAID STATE.

Before considering the constitutional questions, it is of first importance to determine what is the proper construction of Section 12725 of the Ohio General Code. We contend that this section, properly construed, does not prohibit the sale of a compound like "Hebe" consisting of evaporated or condensed skimmed milk and cocoanut oil. The terms "evaporated" and "condensed" are synonymous as applied to milk (Opinion, District Court, Rec. p. 38; Food Inspection Decision No. 158, Secretary of Agriculture, Rec. p. 125).

In order to construe the above section as an absolute prohibition of the sale of "Hebe," it is necessary to say, first, that the sale of condensed skimmed milk is absolutely prohibited; and secondly, that the sale of any product containing condensed skimmed milk as one of its constituents is, on that account, likewise prohibited in Ohio.

Is it the intention of Section 12725 absolutely to prohibit the sale of condensed skimmed milk in Ohio? The evil to be remedied by the statute was the sale of condensed skimmed milk *as and for condensed whole milk*. The section in question was designed to correct that evil. We cannot believe that it was intended by this section to absolutely prohibit the sale of such a wholesome and common article as condensed skimmed milk.

The Ohio laws affirmatively recognize the wholesomeness of skimmed milk by providing for its

sale under proper labelling. Section 12720 of the General Code of Ohio reads as follows:

> "Whoever sells, exchanges, delivers or has in his custody or possession with intent to sell, exchange or deliver, milk from which the cream or part thereof has been removed, unless in a conspicuous place above the center and upon the outside of each vessel, can or package, from which or in which such milk is sold, the words 'skimmed milk' are distinctly marked in uncondensed Gothic letters not less than one inch in length, shall be fined not less than fifty dollars nor more than two hundred dollars."

It is well known that the process of condensing milk, either skimmed or whole milk, consists in simply evaporating some of the surplus water, without eliminating from the residue any of the food value and without otherwise changing or adding anything to the product (Food Inspection Decision No. 158, Secretary of Agriculture, Rec. p. 125). It follows that if skimmed milk (not condensed) is wholesome, then condensed or evaporated skimmed milk is likewise wholesome.

By an Act passed by the Congress of the United States on March 3, 1903, c. 1008 (32 Stat. 1158) a sum of money was appropriated to the U. S. Department of Agriculture "to enable the Secretary of Agriculture in collaboration with the Association of Official Agricultural Chemists, and such other experts as he may deem necessary to establish standards of purity for food products and to determine what are regarded as adulterations therein, for the guidance of the officials of the various states and of the courts of justice * * *." This gave the Secretary of Agriculture authority to establish standards of purity for food products.

United States v. *Frank*, 189 Fed. 195, 198.

Under authority of that Act the Secretary of Agriculture on June 26, 1906, recognized and defined condensed skimmed milk as follows (Circular No. 19, June 26, 1906, Secretary of Agriculture):

> "*Condensed skimmed milk* is skimmed milk from which a considerable portion of water has been evaporated" (Page 6 of the Circular).

Section 3 of the Food and Drugs Act of June 30th, 1906 (34 Stat. 768) confers power upon the Secretary of the Treasury, the Secretary of Agriculture and the Secretary of Commerce and Labor to make uniform rules and regulations for carrying out the provisions of that Act, and its enforcement is placed under the jurisdiction of the Secretary of Agriculture. Acting under this authority the Secretary of Agriculture, under date of March 26, 1915, issued Food Inspection Decision No. 158 (Rec. p. 125), which adopts and proclaims the following definition and standard for condensed milk as a guide for the officials of that Department in enforcing the Food and Drugs Act aforesaid:

> "*Condensed milk, evaporated milk, concentrated milk,* is the product resulting from the evaporation of a considerable portion of the water from the whole, fresh, clean, lacteal secretion obtained by the complete milking of one or more healthy cows, properly fed and kept, excluding that obtained within fifteen days before and ten days after calving, and contains, all tolerances being allowed for, not less than twenty-five and five-tenths per cent (25.5%) of total solids and not less than seven and eight-tenths per cent (7.8%) of milk fat."

Acting under this authority, the Secretary of Agriculture also, under date of March 16, 1917, by Food Inspection Decision No. 170, adopted and

proclaimed the following definition and standard for condensed skimmed milk as a guide for the officials of that Department in enforcing the Food and Drugs Act aforesaid:

> "*Condensed Skimmed Milk, evaporated skimmed milk, concentrated skimmed milk*, is the product resulting from the evaporation of a considerable portion of the water from skimmed milk and contains, all tolerances being allowed for, not less than twenty per cent (20%) of milk solids."

So, also, the Secretary of Agriculture, under the same authority, established and proclaimed the following standard for cocoanut oil (Circular No. 19, June 26, 1906, Secretary of Agriculture):

> "Cocoanut oil is the oil obtained from the kernels of the cocoanut (*cocos nucifera L.*) and subjected to the usual refining processes and free from acidity" (Page 16 of the circular).

And the Secretary of Agriculture by Food Inspection Decision No. 169, under date of January 9, 1917, adopted and proclaimed the following definition and standard for cocoanut oil as a guide for the officials of his Department in enforcing the Food and Drugs Act:

> "*Cocoanut oil, copra oil*, is the edible oil obtained from the kernels of the cocoanut (*cocos nucifera L.* or *cocos butyracea L.*)."

The Court will take judicial notice of these standards (*Caha* v. *United States*, 152 U. S., 211, 221). Therefore, it is submitted, that condensed skimmed milk and cocoanut oil being thus standardized as wholesome food products by the United States Department of Agriculture should be judicially recognized as such.

The food standards established by the Secretary of Agriculture have been adopted very generally throughout the country. We have set forth in an Appendix to this brief the action of a large number of States which have either adopted or provided for the adoption of the Federal standards generally for food products, or have expressly adopted or provided for the adoption of the Federal standard as to condensed skimmed milk (Appendix A *infra*, pp. 73 *et seq.*). Where the States have adopted the Federal standards generally, this action, of course, has the effect of adopting this standard both as to skimmed milk and cocoanut oil.

There is no claim that the food product "Hebe" or either of its ingredients is impure or unwholesome. The following admission was made upon the trial (Rec. p. 66):

> "It was further admitted by defendants through their counsel in open court that Hebe is pure in the sense that there is no dirt or any impurity in it, or anything except skimmed milk and cocoanut oil, and that they have no evidence to show that there is anything in the way of impurities coming into it in the factory; and it is admitted by defendants through their counsel that the superintendent and the manager of the complainants' manufacturing plant who are present in court would, if called as witnesses, testify that the manufacturing processes are all clean and pure, and that the product Hebe when it comes through is tested and found to be clean and pure."

In its opinion the Court below says:

> "*There is no claim that the product, or either of its ingredients, is impure or unwholesome*" (Rec. p. 38).

The food value of skimmed milk is well known and has been officially recognized in the State of Ohio. The Ohio Agricultural Experiment Station in its bulletin of December, 1916, says (Rec. pp. 135, 141):

> "Skimmilk of average quality contains about 3.7 percent protein and 5.1 percent milk sugar. Authorities are generally agreed that both these substances as found in skimmilk are at least fully as digestible and useful to our bodies as those obtainable from any other source. Skimmilk, then, aside from being somewhat low in flavor is a most excellent form of human food, containing in large quantity the very substance which when purchased in other foods is the most expensive ingredient of our diet. It will readily be seen what a great economic loss is caused by throwing away or feeding to animals so valuable a food, and one obtained in common with other animal foods at as great a cost; yet, many thousands of gallons suffer this fate daily in Ohio alone. * * * Skimmilk, then, at 5 cents or even 10 cents per quart would be an extremely economical food, and having a nutritive ratio of 1:1.4 would constitute the cheapest and one of the best sources of the extra protein needed to balance a vegetable diet. Skimmilk also contains an abundant supply of mineral matter which is often sadly deficient in our diets. While devoid of the high flavor and aroma characteristic of butterfat, skimmilk still possesses a delicate and pleasing flavor due to its milk sugar and is in itself to those whose taste has not been spoiled by highly flavored dainties a palatable as well as a highly nutritious food."

Moreover, the cocoanut oil used in "Hebe" is obtained from the kernels or meat of the cocoanut and is of the finest quality, and absolutely pure. (Rec. 57.) The consumption of cocoanut oil as a

food in America alone amounts to five million pounds monthly, and one firm in London, England, handles twenty-five hundred tons of cocoanut oil a week for edible purposes (*id.*). With these facts undisputed in the record, we think it permissible to say that no claim is made nor can be made that cocoanut oil is unwholesome or deleterious to health.

The U. S. Department of Agriculture in Bulletin 505, dated February 13, 1917 (Rec. pp. 130-135), summarized the results of experiments as to the digestibility and wholesomeness of cocoanut oil. This official bulletin states (Rec. p. 131):

> "Cocoanut oil is obtained from the fruit of the palm *Cocos nucifera*. In recent years it has become rather widely known and is assuming considerable importance as a culinary and table fat. It is used in the commercial baking trade more commonly than it is for household purposes and to some extent in the preparation of butter substitutes."

And after referring to a number of experiments conducted by the Department with cocoanut oil it was concluded (Rec. p. 134):

> "The protein and carbohydrates were 64.5 per cent and 96.7 per cent available to the body, values which compare favorably with the thoroughness of digestion of these constituents usually found in similar tests. It may be reasonably concluded on the basis of these results that cocoanut oil is suited to serve satisfactorily for food purposes."

It would seem that an article of food, composed solely of ingredients recognized as wholesome by National and State authority and adopted as such by the common experience of mankind, should not be deemed to be barred from sale in Ohio, unless it is perfectly clear that the Legislature of

that State intended to accomplish that result by Section 12725 of the General Code. Such an intent is not to be implied.

If skimmed milk is wholesome and its sale is permitted under proper labeling (as is the fact in Ohio), can it be supposed that the Ohio Legislature intended absolutely to prohibit the sale of skimmed milk, when condensed, as being unwholesome? This is to impute irrationality to the Legislature.

Does Section 12725 prohibit the sale of "Hebe" in Ohio?

"Hebe" is a compound food product. It is not milk. It is not skimmed milk. It is not condensed skimmed milk. It is a compound which is composed of condensed or evaporated skimmed milk and cocoanut oil, and as a compound it stands upon its own footing. It is a compound recognized by the Federal Department of Agriculture. That Department in its ruling, communicated to the Attorney-General of the State of Ohio under date of August 2, 1916, said (Rec. p. 79):

> "The Bureau is informed that Hebe is a mixture of evaporated skimmed milk and cocoanut fat. It is considered to be a compound within the meaning of section 8 of the Food and Drugs Act, in the case of food, second subdivision of paragraph fourth, which provides that an article of food which does not contain any added poisonous or deleterious ingredients shall not be deemed to be adulterated or misbranded—
>
> In the case of articles labeled, branded, or tagged so as to plainly indicate that they are compounds, imitations, or blends, and the word 'compound,' 'imitation,' or 'blend,' as the case may be, is plainly stated on the package in which it is offered for sale; * * * "

Even admitting, for the sake of argument, that Section 12725 of the Ohio Code makes unlawful

the sale of condensed skimmed milk, though plainly labeled and sold for just what it is, still the sale of "Hebe" is not unlawful unless we go a step further and say that the presence of any quantity of condensed skimmed milk, however slight, in a product makes the sale of such product unlawful, though sold for exactly what it is.

In order to reach this conclusion, it is necessary to hold that "Hebe" is "condensed milk" within the meaning of Section 12725, because that section deals only with condensed milk. But, as we have said, "Hebe" is not condensed milk. It is a distinctive product protected by United States patents, labeled and sold under its own distinctive name "Hebe", and the fact that it is composed in part of condensed skimmed milk does not make it a condensed milk.

Skimmed milk is milk from which the butter fat has been removed. To this skimmed milk a sufficient amount of cocoanut fat is added in the process of manufacturing "Hebe" to supply the place of the butter fat which has been removed. The inclusion in the product "Hebe" of a percentage of vegetable fat under such circumstances cannot be regarded as a subterfuge. It is a *bona fide* creation of a new product. Such inventive and creative activities are not unlawful.

So we have "Hebe", a compound of two admittedly wholesome ingredients, to-wit, condensed skimmed milk and cocoanut oil, scientifically combined so as to remain permanently in solution. The cocoanut oil supplies the place of the butter fat, making a very pleasant and healthful product, plainly labeled to show its exact nature and composition. The nutritious quality of "Hebe" as a compound is abundantly established (Rec. pp. 68, 69).

Aside from constitutional questions, such a product should not be barred from the market un-

less the true intent of the statute makes such a step inevitable.

The statute in question is a penal statute and it is elementary that while it should receive a fair construction, it should not be extended beyond its explicit terms. (*Bolles* v. *Outing Company*, 175 U. S. 262, 265; *Commonwealth* v. *Boston, etc., Milk Co.*, 209 Mass., 30, 37.) The offense must be brought within the terms of the statute, and ambiguities, if there be such, must be resolved in favor of the accused. In the present instance there is no ambiguity. The statute refers to "condensed milk" and it has no application to a compound of the sort here in question, which is sold under its distinctive name and properly labeled with a description of its constituents.

That the statute, according to its proper construction, does not apply to a product like "Hebe" is conclusively shown by numerous authorities and by the decisions of this Court. We have here no construction by the highest court of the State of its own statute which must be accepted by this Court. The construction is solely that of a Federal tribunal, and in that construction we submit there is serious error.

In the case of *State* v. *Crescent Creamery Company*, 83 Minn. 284, the act involved was:

> "No person shall sell or offer for sale any *cream* taken from impure or diseased milk, or cream that contains less than twenty per centum of fat. Whoever violates the provisions of this section shall be deemed guilty of a misdemeanor, and shall be punished by a fine of not less than ten dollars nor more than one hundred dollars."

The Supreme Court of Minnesota in construing this act said:

> "Its obvious purpose is to fix a standard for *cream* and prohibit the sale of any cream,

> *as such*, which is below the prescribed standard * * *. We accordingly hold that the statute in question forbids, and only forbids, the sale of cream, *as such*, which is below the prescribed standard. * * * And the Legislature, by this statute, having, in the exercise of the police power, fixed a standard for all cream to be sold *as such*, the act is valid." (Italics ours.)

In the case of *Genesee Valley Milk Products Company* v. *J. H. Jones Corporation*, 143 App. Div. (N. Y.) 624, 626, 627, the question before the Appellate Division of New York was the construction of Section 37 of the Agricultural Law of that State, which was substantially the same as Section 12725 of the Ohio law. The section of the New York Act was as follows:

> "No condensed milk shall be made or offered or exposed for sale or exchange unless manufactured from pure, clean, healthy, fresh, unadulterated and wholesome milk from which the cream has not been removed either wholly or in part, or unless the proportion of milk solids shall be in quantity the equivalent of twelve per centum of milk solids in crude milk, and of which solids twenty-five per centum shall be fats."

The plaintiff sought to recover the price of certain milk sold to a purchaser as "half and half", which was a condensed milk composed of skimmed milk and whole milk, in equal proportions. The defense of the purchaser was that the milk sold was in violation of the pure food law of the State. But the court held that the sale did not violate any law. McLennan, P. J., said:

> "But in this case we think the Legislature was entirely without power to declare that skimmed milk should not be a part of condensed milk with certain proportions of whole

> milk. There is no suggestion that there is anything unwholesome about skimmed milk, and if it is sold as such, it seems to me that no one ought to complain."

And in his concurring opinion, Kruse, J., said:

> "Condensed milk is a well-known milk product. The statute prescribes that this product, 'condensed milk,' shall not be made, offered or exposed for sale or exchange unless manufactured from milk of a prescribed quality and condition. But, as it seems to me, the making and selling of a condensed mixture of whole and skimmed milk are not prohibited, if made and exposed for sale not as 'condensed milk' but for what it is, as was done in this case.
>
> "This statute should receive a reasonable and not a strict interpretation. It certainly cannot be that the Legislature intended to prohibit absolutely the making of a condensed mixture of whole and skimmed milk. Nor do I think the manufacture or sale of such an article as food is forbidden, if put on the market for what it actually is, and not as condensed milk. Pure skimmed milk, either alone or mixed with whole milk, is not unwholesome, nor is it claimed to be. * * * I think there was not a making or offering or exposing for sale of condensed milk within the meaning of the Agricultural Law."

In *Commonwealth* v. *Boston White Cross Milk Co.*, 209 Mass. 30, the defendant was convicted of adding water to a product which was denominated "concentrated milk," in violation of a statute which prohibited the addition of water to "milk."

The Court, in holding that the "concentrated milk" was not included within the term "milk" as used in the statute, said (p. 36):

> "It is not contended that the manufactured product of the defendant, to which it added water for reduction and sale, was natural

milk as it comes from the cow. And we have searched the evidence in vain for anything upon which it could be found that this manufactured product had come to be known in the trade as milk. Certainly there is no such intimation in the testimony of the government, and that put in by the defendant is wholly to the effect that the defendant's 'concentrated milk' was a new and unique product, manufactured only since 1908, under letters patent, at a factory equipped for that purpose, shipped to the defendant's place of business in Boston, and there extended by the defendant and put upon the market only in its diluted form. There is nothing in the evidence tending to show that the concentrated product had been dealt with in the market, or had been a subject of trade, or even had been in the hands of any dealers other than the defendant itself. A contract for the delivery of milk would not be satisfied by the delivery of this concentrated product, which must be diluted by the addition of water before it could be drunk like milk or made available for use as milk in the ordinary manner. It is no more milk within the meaning of such a contract than natural milk which does not come up to the prescribed standard. *Copeland* v. *Boston Dairy Co.*, 184 Mass. 207, and 189 Mass. 342. The fact that the word 'milk' in this statute has been construed to include cream as one of its natural components (*Commonwealth* v. *Gordon*, 159 Mass. 8) does not indicate that it should include also a substance produced from it by a process of manufacture with artificial appliances involving some chemical changes. The substance itself is not milk, just as butter and cheese and condensed milk are not themselves milk. * * * * * * * * * But we are dealing with a penal statute, and its scope is not to be extended beyond the natural meaning of its words."

In *Hutchinson Ice Cream Co.* v. *Iowa* and *Crowl* v. *Pennsylvania*, 242 U. S. 153, the statutes before

the Court, which prohibited the sale of ice cream containing less than a fixed percentage of butter fat, were assailed as invalid under the Fourteenth Amendment, the Supreme Court of each state having held its statute constitutional. The state statutes involved were those of Iowa and Pennsylvania. This Court, in meeting the objection that the statutes arbitrarily prohibited the sale of a large variety of compounds theretofore included under the name 'ice cream,' held that the acts merely prohibited the sale of such compounds *as* 'ice cream.' The court said:

> "It is specially urged that the statutes are unconstitutional because they do not merely define the term 'ice cream'; but arbitrarily prohibit the sale of a large variety of wholesome compounds theretofore included under the name 'ice cream.' The acts appear to us merely to prohibit the sale of such compounds *as ice cream*. Such is the construction given to the act by the Supreme Court of Iowa. *State* v. *Hutchinson Ice Cream Co.*, 168 Iowa, 1-15, which is, of course, binding on us. We cannot assume, in the absence of a definite and authoritative ruling, that the Supreme Court of Pennsylvania would construe the law of that state otherwise." (Italics ours.)

The material part of the Pennsylvania statute, there in question, reads as follows:

> "Section 4. No ice cream shall be sold within the state containing less than eight (8) per centum butter fat, except where fruit or nuts are used for the purpose of flavoring, when it shall not contain less than six (6) per centum butter fat."

The Pennsylvania statute above quoted does not differ materially from Section 12725 of the Ohio Code, except that the former deals with 'ice cream' and the latter with 'condensed milk.'

We think that the intent and meaning of the Ohio statute is to define a standard for condensed milk, that is, for what is sold as 'condensed milk,' just as the intent and meaning of the Pennsylvania statute, as it appeared to this Court, is to define a standard for ice cream that is, for what is sold as 'ice cream.'

The Pennsylvania statute was not deemed to prohibit the sale of wholesome compounds, even though they had theretofore been included under the name "ice cream", unless it appeared that they were sold as ice cream. It was the sale as ice cream that the statute interdicted. And even more clearly in this case does it appear that the statute has no application whatever to the sale of such a distinctive compound as "Hebe" under its proper label.

An attempt was made in the present case to show that there had been sales, or offers, of "Hebe" as evaporated or condensed milk. But the evidence was slight and inconsequential (Rec. pp. 80, 81). In one instance it appeared that under specifications calling for evaporated milk a certain jobber had sent in some "Hebe",—how much does not appear. In another instance a representative of the Ohio State Board of Agriculture went into a grocery store and asked the clerk if they had any condensed milk. The clerk stated that they had the "Hebe" brand, and the witness said, "That will do." In the case of another grocery store the representative of the Department asked if they had any condensed milk, and when the answer was in the affirmative said, "What brands have you?" The storekeeper, after naming two or three different brands, said, "I have 'Hebe' also, no use of my denying the fact for you see it." Of course this is a most slender basis for the conclusion that "Hebe" was being sold as condensed milk. There is no claim that

"Hebe" was not offered in the cans bearing its distinctive label which described it as it actually was. On the contrary, the evidence is that it was offered in these cans, and it is stipulated that each can bears the label as shown in the bill of complaint (Rec. p. 66). The paucity of the evidence adduced on this point by the defendants clearly shows the inability of the defendants to make a case that "Hebe" was sold or offered for sale except as a distinctive compound under its own label. Had there been any other practice the defendants, with the abundant means at their command, would certainly have established it.

Further, neither in the case of the two groerymen nor in the case of the jobber was the matter brought home in any way to the appellants.

Not only is the product put up in a distinctive manner, conspicuously labeled as a compound, with a truthful description of its constituents, but the appellants have given the most careful instructions to avoid any possible misrepresentation (Rec. p. 77).

It will be time enough to deal with any question of this character when anyone—a jobber or groceryman—is prosecuted for selling "Hebe" as condensed milk. *The appellants are not seeking to restrain that application of the statute.* The appellants are not seeking in any manner to prevent the State of Ohio from enforcing any provision which is of the slightest value in preventing any sort of imposition.

In the case of the Pennsylvania statute, which was before the Court in the *Hutchinson* case (*supra*), the fact that the statute reached compounds which were sold as 'ice cream' did not lead to the conclusion that it amounted to a prohibition of the sale of the compounds under their appropriate designations.

In the present case the appellants seek to prevent the defendants from interfering with the legitimate trade in this product, *as a distinctive product, pure and wholesome, sold under its own name and in accordance with the description conspicuously set forth upon its labels.* In the case of every can, the purchaser of "Hebe" is definitely informed just what he is buying by the label upon the can itself, and the appellants are most careful that their product shall not be described in any other manner.

The present point is that Section 12725 of the Ohio General Code does not prohibit the sale of products such as "Hebe" under their appropriate characterizations with distinctive labels.

Other Sections of the Ohio Code.

In the opinion of the District Court (Rec. pp. 39-41) reference is made to certain Sections of the Ohio Code, other than Section 12725, dealing with the subject of adulteration and misbranding of food. The references are to Sections 5774, 5775, 5778, 5785, 12716, 12717 and 12718.

We believe that a careful reading of the opinion (see Rec. p. 40, last paragraph) will show conclusively that the decision is based solely on Section 12725.

However, since the other sections above named have been referred to in the opinion, we comment on them as follows:

Section 5774 simply makes it unlawful to manufacture for sale, offer for sale, sell or deliver, or have in possession with intent to sell or deliver, a drug or article of food which is adulterated or misbranded within the meaning of the chapter.

This section would not affect "Hebe," because it is neither adulterated nor misbranded within

the meaning of this chapter, and the Court did not hold that it is.

Section 5775 defines what shall be deemed to be included within the terms "drug" and "food" as used in the chapter, and provides that the term "food" shall include compound articles used by man for food.

"Hebe" would be deemed to be a food within the meaning of the definition.

Section 5778 contains eleven definitions of what shall be deemed to be adulteration within the meaning of the chapter (Chapter 1).

"Hebe," when labeled in the manner described in the bill of complaint (Rec. pp. 3, 65) and sold under that label and as and for the product described by that label, would not be adulterated under any of the definitions of adulteration contained in the section.

It does not follow that because "Hebe" consists in part of evaporated skimmed milk—skimmed milk being a product from which butter fat has been removed—that "Hebe" is adulterated under the third definition of adulteration in this section. Nor does it follow that skimmed milk or evaporated skimmed milk is adulterated under that definition and we submit that the court below was in error in so holding (Rec. p. 40). This is apparent from the following rulings:

For example, *chocolate* "is the solid or plastic mass obtained by grinding cocoa nibs without the removal of fat or other constituents except the germ, and contains not more than three (3) per cent. of ash insoluble in water, three and fifty hundredths (3.50) per cent. of crude fiber, and nine (9) per cent. of starch, and not less than forty-five (45) per cent. of *cocoa fat*", and *cocoa* is "*cocoa* nibs, with or without the germs, *deprived of a portion of its fat* and finely pulverized, and contains percentages of ash, crude fiber, and starch corre-

sponding to those in chocolate after correction for fat removed" (Circular No. 19, June 26, 1906, U. S. Dept. of Agriculture, *supra*, page 17). (Italics ours.)

'Cocoa fat' is a valuable ingredient of chocolate and it is removed in the manufacture of cocoa, but cocoa is not adulterated within the meaning of the definition referred to.

Rose vs. *State*, 11 Ohio Cir. Ct. Rep. 87, 1 Ohio C. D. 72.

In the above case the identical definition involved here was construed by the courts directly contrary to the construction placed upon it by the District Court in the case at bar.

Again, *molasses* is a common article of food, but a valuable or necessary ingredient, to-wit, sugar has been removed from it. (Circular No. 19, June 26, 1906, U. S. Dept. of Agriculture.)

Is the sale of molasses prohibited by Chapter 1 of the food law of Ohio? We think not.

If the construction placed upon Section 5778 by the District Court were the correct one the sale of both cocoa and molasses would be prohibited, as they would both be adulterated food and as such their sale would be prohibited by the terms of section 5774 *supra*. We have searched the laws of Ohio in vain for any standard for these products, or for anything which would indicate that the legislature intended to take them out from under the alleged prohibition of the section, as the Court reasoned with respect of skimmed milk, the labeling of which is provided for by a special section (Rec. p. 40).

There are many other common articles of food whose sale would be prohibited under such a construction, such as buttermilk and others for which no "exempting clause" (Rec. p. 40) can be found in any of the laws of Ohio.

In order to determine whether any valuable or necessary constituent has been abstracted from an article, it is necessary to determine what the article is, or is represented to be. If, for illustration, an article is represented to be condensed whole milk and upon analysis it is found that the butter fat has been removed from it, then, of course, a valuable or necessary constituent or ingredient has been removed from it. But if the article is represented to be condensed skimmed milk, and upon analysis it is found that it contains no butter fat, the article will not be deemed to be adulterated, because the standard for condensed skimmed milk does not provide that it shall contain butter fat, but on the contrary, as we have seen from the standard and definitions for condensed skimmed milk, *supra*, the product is milk that has been skimmed, which means, of course, that the butter fat has been removed. And, of course, in the case of a food product, the fact that one of the ingredients is condensed skimmed milk does not make it adulterated. In dealing with this precise point, Thornton on Pure Food and Drugs, paragraph 120, pages 202-203, in referring to the Federal Food and Drugs Act, states:

> "The statute provides that an article of food shall be deemed adulterated 'if any valuable constituent of the article has been wholly or in part abstracted from it'. But an article from which a valuable part of it has been abstracted may be sold if the package is so labeled or accompanied by a statement to show that fact, if it be wholesome. Thus regulation 26 provides that, 'When an article is made up of refuse materials, fragments or trimmings, the use of the name of the substance from which they are derived, unless accompanied by a statement to that effect, shall be deemed a misbranding. Packages of such materials may be labeled "pieces,"

> "stems," "trimmings," or with some similar appellation.' *This does not prevent the sale of skimmed milk if it be sold as skimmed milk and not as a whole milk.*" (Italics ours.)

And again, on page 204, Thornton states:

> "If the label truly states the several substances entering into the food, then such food may be sold and no offense committed. It is mixed or blended or compound food. * * *"

"Hebe" is sold as a compound of condensed skimmed milk and vegetable fat and the composition of the product is plainly indicated on the label and no valuable or necessary constituent or ingredient has been wholly or in part abstracted from it. It conforms in all respects to what the label represents it to be. It is not adulterated or misbranded under any definition of adulteration or misbranding in the Ohio law.

Section 5785—relates entirely to misbranding. It has nothing whatever to do with adulteration. It contains the proviso referred to in the opinion of the District Court (Rec. p. 39). The effect of that proviso is that if an article of food is appropriately labeled as a compound or mixture, according to the terms of the proviso, the definitions of misbranding contained in that particular section shall not apply to the article. It means that whereas an article might otherwise be misbranded within the meaning of that section, it shall not be deemed to be misbranded if labeled correctly under the proviso. "Hebe" is not misbranded in any sense under the definitions of misbranding in that section. The courts of Ohio have held that the proviso is not a mandatory labeling requirement and consequently it is not necessary in any event for "Hebe" to be labeled to comply with the letter of the proviso.

In the case of *The J. M. Sealtz Company* vs. *The State of Ohio*, decided by the Court of Appeals for Allen County, Ohio, on December 28th, 1917, the court said:

> "The proviso contained in Section 5785, General Code, is *not* a requirement that packages containing mixtures or compounds shall be labeled, with the name and percentage in terms of one hundred per cent of each ingredient, as therein specified, but it is an exclusion of such packages from the defined offense of misbranding."

This case is unreported, but we have procured a certified copy of the memorandum opinion of the Court and filed the same with the Clerk of this Court. An application was made for review by the Supreme Court of Ohio, but that Court declined to grant a *certiorari*. We have also filed with the Clerk of this Court a certified copy of the memorandum of the Supreme Court of Ohio.

Section 12716—simply fixes the standard for whole milk and is not involved here.

Section 12717—simply prohibits the adding of water to milk, or the sale of adulterated or unclean whole milk and is not involved here.

Section 12718—simply provides a penalty and is not involved here.

None of the sections mentioned by the court apply to "Hebe".

By the passage of Section 12720 the Legislature of Ohio recognized that the people can be protected in their purchases of skimmed milk by proper labeling of the product in the manner prescribed by the statute. How can it be said that the people are not protected in their purchases of "Hebe" by the clearly appropriate label that is on it? That labeling, considered in connection with the ample provisions made by the food laws of Ohio for punishing any person who practices

fraud or deceit in the sale of a food product, is all the reasonable protection necessary. It would be unreasonable and unnecessary to go further and absolutely prohibit the sale of the product, and that, we submit, the Legislature of Ohio did not do.

II.

IF THE LEGISLATION IN QUESTION CAN BE DEEMED TO BE APPLICABLE, THE PROHIBITION OF THE SALE OF THIS PRODUCT IN OHIO IS AN UNCONSTITUTIONAL INTERFERENCE WITH INTERSTATE COMMERCE. THE APPELLANTS ARE ENTITLED TO BE PROTECTED AGAINST INTERFERENCE WITH SALES IN THE ORIGINAL PACKAGES. THE PROHIBITION OF THE STATUTE IS REPUGNANT TO THE FEDERAL FOOD AND DRUGS ACT.

(1) There can be no question that if the legislation, as construed, constitutes an interference with interstate commerce, the appellants are entitled to complain. This question was raised and decided in *Savage* v. *Jones*, 225 U. S., 501, 519, 520, where the Court said:

> "It is said that the complainant is not entitled to invoke the constitutional protection, in that he fails to show injury. * * * It clearly appears from the bill that the complainant was engaged in dealing with purchasers in another State. His product manufactured in Minnesota was, in pursuance of his contracts of sale, to be delivered to carriers for transportation to the purchasers in Indiana. This was interstate commerce, in the freedom of which from any unconstitutional burden the complainant had a direct interest. The protection accorded to this commerce by the Federal Constitution extended to the sale by the receiver of the goods in the

original packages. *Leisy* v. *Hardin*, 135 U. S. 100; *In re Rahrer*, 140 U. S. 545, 559, 560; *Plumley* v. *Massachusetts*, 155 U. S. 461, 473; *Vance* v. *Vandercook Co.* (No. 1), 170 U. S. 438, 444, 445; *Schollenberger* v. *Pennsylvania*, 171 U. S. 1, 22-25; *Heyman* v. *Southern Railway Co.*, 203 U. S. 270, 276. An attack upon this right of the importing purchasers to sell in the original packages bought from the complainant, not only would be to their prejudice, but inevitably would inflict injury upon the complainant by reducing his interstate sales, a result to be avoided only through his compliance with the act by filing the statement and affixing to his goods the labels it required. According to the bill, the State Chemist had threatened the complainant that in default of such compliance he would cause the arrest and prosecution of every person dealing in the article within the State and had distributed broadcast throughout the State warning circulars. If the statute of Indiana, as applied to sales by importing purchasers in the original packages, constitutes an unwarrantable interference with interstate commerce in the complainant's product, he had standing to complain, and was entitled to relief against enforcement by the defendant of the illegal demands. *Scott* v. *Donald*, 165 U. S. 107, 112; *Ex Parte Young*, 209 U. S. 123, 159, 160; *Ludwig* v. *Western Union Telegraph Co.*, 216 U. S. 146; *Hopkins* v. *Clemson College*, 221 U. S. 636, 643-645; *Philadelphia Co.* v. *Stimson*, 223 U. S. 605, 620, 621".

From the stipulation of facts (Rec. pp. 49, 50) it appears that the appellants "are engaged in manufacturing and selling outside the State of Ohio, and shipping to the State of Ohio, the food product" in question; that they deal "with wholesale dealers, jobbers and distributors, residing and doing business in the State of Ohio"; that the appellants "receive orders for said food product from said wholesale dealers, jobbers and distribu-

tors in the State of Ohio and then fill said orders by shipping said product from plaintiffs' places of business outside of the State of Ohio to said wholesale dealers, jobbers and distributors in the State of Ohio"; that "said wholesale dealers, jobbers and distributors then sell said product to retail dealers (and in some instances directly to large consumers such as restaurants and hotels) in the State of Ohio"; and that "said retail dealers sell the said food product direct to consumers in the State of Ohio".

(2) The defendants expressly admit, by their stipulation, that it is their intention to prevent all sales of the product within the State, including those by wholesalers, jobbers, distributors as well as retailers. They say in their stipulation (Rec. p. 52):

> "10. The defendants, Norman E. Shaw, as Secretary of Agriculture of Ohio, and Thomas C. Gault, as Chief of Bureau of Dairy and Foods of the Board of Agriculture of Ohio, have served notice upon plaintiffs and their customers in the state of Ohio that said product 'Hebe' cannot be sold or distributed in the state of Ohio from and after the ninth day of July, 1918, and if after that date said product be found upon the market, said defendants will cause prosecutions to be brought against all wholesalers, jobbers, distributors and retailers selling, offering or exposing for sale the said product known as "Hebe" in the state of Ohio."

It is manifest that the Act is construed by these officials to be applicable, and that they threaten to apply it, to all sales which are made within the State whether by the wholesalers, jobbers, distributors or retailers, these sales being made in the original packages.

The appellants complain in their bill of complaint of this interference with their constitutional right to engage in interstate commerce, and the question thus raised was properly presented to the District Court. But the District Court overruled their contention and dismissed the bill, denying the appellants all relief. It is submitted that this was clear error.

(3) Even if it were assumed, for the sake of argument, that the State of Ohio could prohibit the sale of a wholesome product of this sort when manufactured and sold within the State, the State had no power to prevent a sale of this product when manufactured outside the State and sold within the State in the original packages in which it had been imported.

> *Schollenberger* vs. *Pennsylvania*, 171 U. S. 1;
> *Collins* vs. *New Hampshire*, 171 U. S. 30.

In *Schollenberger* vs. *Pennsylvania*, *supra*, the Court *held*, with respect to oleomargarine, despite the decision in *Powell* vs. *Pennsylvania* (127 U. S. 678), that whatever power the State might have with respect to oleomargarine manufactured and sold within the State, its power did not extend to the interdiction of, or interference with, interstate commerce in that article. The Court said (pp. 13-16):

> "The Court said" (referring to cited cases) "that a State could not, under the cover of exerting its police powers, substantially prohibit or burden either foreign or interstate commerce. Reasonable and appropriate laws for the inspection of articles, including food products, were admitted to be valid, but absolute prohibition of an unadulterated, healthy and pure article has

never been permitted as a remedy against the importation of that which was adulterated and therefore unhealthy or impure.

"We do not think the fact that the article is subject to be adulterated by dishonest persons, in the course of its manufacture, with other substances, which it is claimed may in some instances become deleterious to health, creates the right in any State through its legislature to forbid the introduction of the unadulterated article into the State. * * *"

"It is claimed, however, that the very statute under consideration has heretofore been held valid by this court in the case of *Powell* v. *Pennsylvania*, 127 U. S. 678. That case did not involve rights arising under the commerce clause of the Federal Constitution. The article was manufactured and sold within the State, and the question was one as to the police power of the State acting upon a subject always within its jurisdiction * * *"

"The *Powell case* did not and could not involve the rights of an importer under the commerce clause. The right of a State to enact laws in relation to the administration of its internal affairs is one thing, and the right of a state to prevent the introduction within its limits of an article of commerce is another and a totally different thing. Legislation which has its effect wholly within the State and upon products manufactured and sold therein might be held valid as not in violation of any provision of the Federal Constitution, when at the same time legislation directed towards prohibiting the importation within the State of the same article manufactured outside of its limits might be regarded as illegal because in violation of the rights of citizens of other States arising under the commerce clause of that instrument.

"Referring what is said in the opinion in *Powell's case* to the facts upon which the case arose, and in regard to which the opinion was based and the case decided, there is nothing whatever inconsistent with that opinion in

> holding, as we do here, that oleomargarine is a legitimate subject of commerce among the States, and that no State has a right to totally prohibit its introduction in its pure condition from without the State under any exercise of its police power."

The same ruling was made in the case of *Collins* vs. *New Hampshire, supra,* where it was held that the State of New Hampshire, prohibiting the sale of oleomargarine as a substitute for butter, unless it is of a pink color, was invalid under the commerce clause, because it was in its necessary effect prohibitory. The Court said (pp. 33-34):

> "In a case like this it is entirely plain that if the State has not the power to absolutely prohibit the sale of an article of commerce like oleomargarine in its pure state, it has no power to provide that such article shall be colored, or rather discolored, by adding a foreign substance to it, in the manner described in its statute. Pink is not the color of oleomargarine in its natural state. The act necessitates and provides for adulteration. It enforces upon the importer the necessity of adding a foreign substance to his article, which is thereby rendered unsalable, in order that he may be permitted lawfully to sell it. If enforced, the result could be foretold. To color the substance as provided for in the statute naturally excites a prejudice and strengthens a repugnance up to the point of a positive and absolute refusal to purchase the article at any price. The direct and necessary result of a statute must be taken into consideration when deciding as to its validity, even if that result is not in so many words either enacted or distinctly provided for * * *"
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> * * * * * * * *
>
> "* * * The truth is, however, as we have above stated, the statute in its necessary effect is prohibitory, and therefore upon

the principle recognized in the Pennsylvania cases it is invalid."

So also, upon the grounds explicitly stated in *Schollenberger* v. *Pennsylvania,* the case is not within the rule of *Plumley* v. *Massachusetts,* 155 U. S. 462. There the statute prevented the sale of oleomargarine in imitation of yellow butter. Attention was called, as the Court stated in the *Schollenberger* case "to the fact that the statute did not prohibit the manufacture or sale of all oleomargarine, but only such as was colored in imitation of yellow butter produced from unadulterated milk or cream of such milk." In other words, the statute there under consideration was not a prohibition of the sale of a pure or wholesome article of food, but a mere regulatory statute to suppress false pretences and to promote fair dealing.

In the case at bar the statute is not regulatory, but prohibitory. If the construction placed upon it by the Court below could be deemed to be correct and the statute could thus be held applicable to this product, it prevents absolutely all sales within the State, including those by the wholesalers, jobbers and distributors as well as retailers, thus operating as a manifest interference with interstate commerce in a wholesome article of food.

What has already been said with respect to the character of the product need not be repeated here. Its purity and wholesomeness are not in question and it is sold under a plain and honest label. The whole object of the Ohio statute, if deemed to be applicable, is absolutely to prohibit its sale.

(4) There can be no question but that the fibre shipping cases, containing 48 one-pound cans or

96 six-ounce cans respectively, in which "Hebe" is brought into the State, are within the protection of the constitution, and that under the commerce clause the product may be sold in these packages after they have been brought within the State. In short, under any possible view of original packages, these cases come within the rule:

> *Brown* v. *Maryland*, 12 Wheaton, 419;
> *Leisy* v. *Hardin*, 135 U. S. 100;
> *Rhodes* v. *Iowa*, 170 U. S. 412, 424;
> *Schollenberger* v. *Pennsylvania*, 171 U. S. 1, 19;
> *May* v. *New Orleans*, 178 U. S. 496;
> *Austin* v. *Tennessee*, 179 U. S. 343;
> *Savage* v. *Jones*, 225 U. S. 501, 520.

The defendants made an explicit admission in the District Court, as follows (Rec. pp. 65-66):

> "It was thereupon admitted by defendants through their counsel in open court that when the said food product (Hebe) is shipped into the State of Ohio it is contained in tin cans of two sizes, one holding one pound of said product, and the other holding six ounces; and each can bears the label as shown by the bill of complaint; that said cans labeled as aforesaid when shipped into the State of Ohio are packed in fibre shipping cases completely sealed and completely concealing said cans and the label thereon, each case of one pound cans containing forty-eight cans, and each case of six ounce cans containing ninety-six cans; that the shipping case exhibited in court (plaintiffs' exhibit No. 12) is used for the transportation of Hebe into the State of Ohio. * * *"
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> * * * * * * * *
>
> "Thereupon, it was further admitted by defendants, through their counsel in open court that when Hebe is shipped into Ohio in less than carload lots, said fibre shipping cases

> are marked only with the name of the consignee and such other data as is necessary to insure proper identification of the product and delivery of the shipment; but that when shipped in carload lots such cases are not marked with the name of the consignee; that when said shipping cases are received by a retail dealer in the State of Ohio, the individual cans, labeled with the label shown by the bill of complaint, are removed from said shipping cases by such retail dealer and exposed for sale on the shelves of said retail dealer as individual units, and in the great majority of instances are purchased by consumers one can at a time."

According to the course of trade in the present case (Rec. p. 49) the wholesale dealers, jobbers and distributors sell this product to retail dealers in the original shipping cases. In other words, wholesalers, jobbers and distributors normally sell by the case and not by the individual can. This right of the appellants to have their interstate trade preserved and not to have sales by wholesalers, jobbers and distributors interfered with under this prohibitory legislation of Ohio is clearly presented by the bill and was erroneously denied by the decree of the Court below, which dismissed the bill.

(5) Under the Federal Food and Drugs Act of June 30, 1906 (34 Stat. 768), the "original package" is the immediate container of the product which is intended for the consumer.

"Hebe" is a food compound within the meaning of the Federal Act and to the extent that any Ohio statute interferes with or frustrates the operation of the Act of Congress in relation to this product the State statute is void.

When a State statute and a Federal statute operate upon the same subject-matter and pre-

scribe different rules concerning it, and the Federal statute is one within the competency of Congress to enact, the State statute must give way.

Gulf, Colorado & Santa Fe R'way v. *Hefley*, 158 U. S., 98.

Northern Pacific Railway Co. v. *Washington*, 222 U. S. 370, 378.

Erie R. R. Co. v. *New York*, 233 N. Y., 671, 683.

The product in question in this case is a compound within the meaning of *Section 8 of the Federal Food and Drugs Act*. It contains no added poisonous or deleterious ingredients. It is labeled as required by the Federal Act. The officials of the Federal Department of Agriculture have held that "Hebe" is a mixture of evaporated skimmed milk and cocoanut fat and is considered to be a compound within the meaning of Section 8 of the Federal Act (Rec. p. 79).

See *United States* v. *779 Cases of Molasses*, 174 Fed. 325.

Undoubtedly the State has the authority to make reasonable regulations with respect to food products where these are not in conflict with the Act of Congress (*Savage* v. *Jones*, 225 U. S., 501), but in this instance the State of Ohio has not attempted to regulate this product, still less has it sought to make any regulation consistent with the Federal Act, but on the contrary it imposes, if the statute can be deemed to be applicable, an absolute prohibition of all sales. It is beyond the power of the State to denounce "Hebe" as misbranded or adulterated or otherwise as not an acceptable article of commerce, for the product is

directly within the protection of the Federal Food and Drugs Act, it being a product manufactured in another State and brought within the State of Ohio in the course of interstate commerce and Congress having taken possession of that field and established the applicable rules.

In the Federal Act, Congress has dealt with the *immediate containers* of food products which are manufactured in one State and introduced into another. Congress aimed at the protection of consumers, and this object could not be accomplished if the labels it required were those only upon shipping cases and not upon the immediate containers intended for the consumers. There would be no adequate opportunity for Government inspection if such food products, and the drugs, within the Act, were no longer within Federal control when they were removed from the shipping cases and placed upon the shelves of dealers for sale. Accordingly, Congress, having full authority over interstate commerce and the power to fix the rules under which the product in question entered the State of Ohio, took the subject-matter under its control, and a prohibitory State statute which interferes with the operation of the Federal Act, or attempts to substitute its rule for that established by Congress, is nugatory.

This question is determined by the decision of this Court in

McDermott v. *Wisconsin*, 228 U. S. 115.

In that case, this Court construed the provisions of the Federal Food and Drugs Act, and particularly the provisions of Sections 7, 8 and 10 with respect to labeling or branding. It was held that Congress was aiming at the contents of

the package as it shall reach the consumer, for whose protection the Act was primarily passed, and that it is the branding upon the package which contains the article intended for consumption itself which is the subject matter of regulation. In short, the provisions of Sections 7 and 8 of the Federal Food and Drugs Act were held to refer "to the immediate container of the article", and it was decided that the provisions of the statute as thus construed were clearly within the powers of Congress over the facilities of interstate commerce.

The plaintiffs in error in the *McDermott* case had been convicted of violating a statute of Wisconsin, purporting to have been passed for the protection of the public health, which provided (among other things) that no one should sell syrup bearing any designation or brand other than that required by the local statute. The plaintiffs in error had bought "Karo" corn syrup from wholesale grocers in Chicago and had received from that city "twelve half-gallon tin cans or pails of the article designated in the complaints, each shipment being made in wooden boxes containing the cans," and when the goods were received at their stores "the respective plaintiffs in error took the cans from the boxes, placed them on the shelves for sale at retail and destroyed the boxes in which the goods were shipped to them as was customary in such cases". It was the contention of the plaintiffs in error that the cans had been labeled in accordance with the Federal Food and Drugs Act and that the local statute was repugnant to the Act of Congress and was invalid as an unconstitutional deprivation of their right to sell the article which had been brought

into the State duly labeled as the Federal statute required. This contention was sustained by this Court. Congress, it was said, had the right to provide what label the goods should have, and while the State could make reasonable regulations to provide against fraud and imposition (as was held in *Savage* v. *Jones*, 225 U. S. 501), the State could not act in derogation of the privilege enjoyed in interstate commerce under the Act of Congress. The Court said (pp. 130-131):

> "That the word 'package' or its equivalent expression, as used by Congress in sections 7 and 8 in defining what shall constitute adulteration and what shall constitute misbranding within the meaning of the act, clearly refers to the *immediate container of the article* which is intended for consumption by the public, there can be no question. And it is sufficient, for the decision of these cases, that we consider the extent of the work package as thus used only, and we therefore have no occasion, and do not attempt, to decide what Congress included in the terms 'original unbroken package' as used in the second and tenth sections and 'unbroken package' in the third section. Within the limitations of its right to regulate interstate commerce, *Congress manifestly is aiming at the contents of the package as it shall reach the consumer*, for whose protection the act was primarily passed, and it is the branding upon the package which contains the article intended for consumption itself which is the subject-matter of regulation. Limiting the requirements of the act as to adulteration and misbranding simply to the outside wrapping or box containing the packages intended to be purchased by the consumer, so that the importer, by removing and destroying such covering, could prevent the operation of the law

on the imported article yet unsold, would render the act nugatory and its provisions wholly inadequate to accomplish the purposes for which it was passed.

"The object of the statute is to prevent the misuse of the facilities of interstate commerce in conveying to and placing before the consumer misbranded and adulterated articles of medicine or food, and in order that its protection may be afforded to those who are intended to receive its benefits the brands regulated must be upon the packages intended to reach the purchaser. This is the only practical or sensible construction of the act, and, for the reasons we have stated, we think the requirements of the act as so construed clearly within the powers of Congress over the facilities of interstate commerce, and such has been the construction generally placed upon the act by the Federal courts."

It was insisted, however, that since the cans had been removed from the boxes in which they had been shipped in interstate commerce and were on the shelves of the plaintiffs in error for sale, "they had therefore passed beyond the jurisdiction of Congress and their regulation was exclusively a matter for State legislation." This Court, reviewing the 'original package' cases, overruled this contention and held that the plaintiffs were entitled to sell the cans which they had removed from the coverings in which they were brought into the State, and that their conviction for so doing under the local statute should be reversed, the statute as thus applied being beyond the power of the State. It was said that the 'original package' doctrine was not intended to limit the right of Congress to keep the channels of interstate commerce free from the carriage of injurious or fraudulently branded articles and to

choose appropriate means to that end and that it necessarily followed that Congress could provide, as it had provided, for following the adulterated or misbranded article to the shelf of the importer. Section 10 of the Food and Drugs Act provided that the articles might be proceeded against and it was enough by the terms of the Act "if the articles are *unsold*, whether in original packages or otherwise." And the provisions of Section 10 were held to be clearly within the power of Congress under the interstate clause. The Court said (pp. 135-137):

> "In the view, however, which we take of this case it is unnecessary to enter upon any extended consideration of the nature and scope of the principles involved in determining what is an original package. For, as we have said, keeping within its Constitutional limitations of authority, Congress may determine for itself the character of the means necessary to make its purpose effectual in preventing the shipment in interstate commerce of articles of a harmful character, and to this end may provide the means of inspection, examination and seizure necessary to enforce the prohibitions of the act, and when section 2 has been violated the Federal authority, in enforcing either section 2 or section 10, may follow the adulterated or misbranded article at least to the shelf of the importer.
>
> "Congress having made adulterated and misbranded articles contraband of interstate commerce, in the manner we have already pointed out, provides in section 10 of the act that such articles may be proceeded against and seized for confiscation and condemnation while being transported from one State, Territory, district, or insular possession to another for sale, or, having been transported, remaining 'unloaded, unsold, or in original

unbroken packages,' and the subsequent provisions of the section regulate the disposition of the articles seized. To make the provisions of the act effectual, Congress has provided not only for the seizure of the goods while being actually transported in interstate commerce, but has also provided for such seizure after such transportation and while the goods remain 'unloaded, unsold, or in original unbroken packages.' The opportunity for inspection en route may be very inadequate. The real opportunity of Government inspection may only arise when, as in the present case, the goods as packed have been removed from the outside box in which they were shipped and remain, as the act provides, 'unsold.' It is enough, by the terms of the act, if the articles are *unsold*, whether in original packages or not. Bearing in mind the authority of Congress to make effectual regulations to keep impure or misbranded articles out of the channels of interstate commerce, we think the provisions of Section 10 are clearly within its power. Indeed it seems evident that they are measures essential to the accomplishment of the purpose of the act.

"The doctrine of original packages had its origin in the opinion of Chief Justice Marshall in *Brown* v. *Maryland*, already referred to. It was intended to protect the importer in the right to sell the imported goods which was the real object and purpose of importation. To determine the time when an article passes out of interstate into state jurisdiction for the purpose of taxation is entirely different from deciding when an article which has violated a Federal prohibition becomes immune. The doctrine was not intended to limit the right of Congress, now asserted, to keep the channels of interstate commerce free from the carriage of injurious or fraudulently branded articles and to choose appropriate means to the end. The legislative means pro-

vided in the Federal law for its own enforcement may not be thwarted by state legislation having a direct effect to impair the effectual exercise of such means."

In the *McDermott* case, the authorities of the State of Wisconsin sought to interdict the sale of the article unless the Federal label were removed and the State label put in its place. In the present case, the authorities of Ohio seek, under the statute as construed, to interdict the sale of the article in the immediate container, which has been introduced into the State in interstate commerce and bears the label satisfying the Federal Food and Drugs Act. It is manifest that if the State cannot prohibit the sale unless there is a substitution of labels, it certainly cannot prohibit the sale altogether. The point is whether the State can exercise its authority over the article brought within the State in the course of interstate commerce over which Congress, by appropriate legislation, has assumed control. The decision in the *McDermott* case is to the effect that nothing can be done by the State which is in derogation of the exercise of the authority of Congress in the Federal Food and Drugs Act, and that this authority extends to the labeling of the article in the immediate container as it reaches the consumer and that the importer of the article is entitled to sell it in that container bearing the label which accords with the Federal Act.

If the Act of Congress protected "Karo" corn syrup in the can, removed from the larger package within which it had been brought into the State, the same Act protects "Hebe" in the original can removed from the fibre case within which "Hebe" was brought into the State of Ohio. If the State

of Wisconsin could not prevent the plaintiffs in error in the *McDermott* case who had purchased "Karo" from selling "Karo," as duly labeled under the Act of Congress, they cannot prevent the appellants and the Ohio dealers from selling "Hebe" in the can duly labeled under the Act of Congress. If the power of the State of Ohio reaches "Hebe" in the individual can appropriately labeled under the Act of Congress, because it has been removed from the fibre case in which it was brought into the State with other similar cans, the State of Wisconsin had an equal right to prohibit the sale of "Karo" in its individual cans, and having that right could provide as a condition of sale what label "Karo" should bear. The denial by the *McDermott* case of this right on the part of Wisconsin demonstrates the absence of the right now claimed by Ohio.

The case of the *Purity Extract Company* v. *Lynch*, 226 U. S. 192, is in no way opposed. In that case no question was presented or decided with respect to original packages under the Federal Food and Drugs Act. The contention made in that case was with respect to the application of the *Wilson Act* of August 8, 1890 (26 Stat. 313) and even this contention it was not necessary for the Court to consider in view of the state of the record. So far as original packages were concerned the contention was addressed solely to the question of original packages entirely apart from the provisions of the Federal Food and Drugs Act, and this decision was prior to the ruling in the *McDermott* case.

Nor was the question before the Court in *Price* v. *Illinois*, 238 U. S., 446. In that case the record was wholly insufficient to raise the question (*id.* pp. 454, 455). The case was one of a *preservative*

containing boric acid. This preservative was covered by a specific provision of the Illinois statute as construed by the Supreme Court of Illinois (*id.* pp. 448, 450). It does not appear that a preservative of this sort, which is not a food product in tiself, is within the Federal Food and Drugs Act or that the Federal Act had any application. Nor did it appear that there had been a compliance with that Act, if it applied. On the contrary, the use of boric acid in a food product was condemned by the Federal authorities (*id.* p. 453; *Hipolite Egg Co.* v. *United States*, 220 U. S., 45), and the preservative in the *Price* case had no standing whatever under the Federal law. If the Federal Act applied to that preservative, it did not protect it, and if it was inapplicable of course no question arose under it. There is nothing in the *Price* case which in any way detracts from the ruling in the *McDermott* case.

The doctrine of the *McDermott* case has been followed in

> *Corn Products Refining Co.* v. *Weigle*, 221 Fed., 988.
>
> *Courtice Brothers Co.* v. *Weigle* (District Court of the United States for the Western District of Wisconsin, decided October 30, 1916, not yet reported).

In the latter case Judge Sanborn said:

> "I think Congress, by the Food and Drugs Act, has made the immediate container the package of interstate commerce by providing that such container shall bear the food label, and by authorizing the seizure of such container by the Federal courts, and the destruction of its contents, in case it be decided that it is misbranded. This, I think, is estab-

lished by the *McDermott* case and by the provisions of the statute. This container is the package of interstate commerce as well as the large package in which the interstate shipment is made, and the State has no power to prevent its sale.

"This view is confirmed, I think, by the special legislation authorizing the Secretary of Agriculture to investigate food adulterations and publish results, followed by investigation and such publication and the inspection and decision of the three secretaries".

The decision in *McDermott* v. *Wisconsin* shows clearly that the appellants were entitled to a decree in this case restraining the defendants from interfering with the sales of the product in question contained in the cans intended for the consumer, whether or not the sales were made of the product in the fibre cases containing one or more cans, or of the individual cans themselves.

III.

THE PROHIBITION BY THE LEGISLATION IN QUESTION, AS CONSTRUED BY THE COURT BELOW, OF THE SALE WITHIN THE STATE OF OHIO OF THIS PRODUCT, CONCEDEDLY PURE, WHOLESOME AND NUTRITIOUS, IS INVALID AS A DEPRIVATION OF LIBERTY AND PROPERTY, AND A DENIAL OF THE EQUAL PROTECTION OF THE LAWS, CONTRARY TO THE FOURTEENTH AMENDMENT.

"The liberty mentioned in that amendment means not only the right of the citizen to be free from the mere physical restraint of his person, as by incarceration, but the term is deemed to embrace the right of the citizen to be free in the enjoyment of all his faculties; to be free to use them in all lawful ways; to

> live and work where he will; to earn his livelihood by any lawful calling; to pursue any livelihood or avocation, and for that purpose to enter into all contracts which may be proper, necessary and essential to his carrying out to a successful conclusion the purposes above mentioned."

Allgeyer v. *Louisiana*, 165 U. S., 578, 589.

See also,

Adams v. *Tanner*, 244 U. S. 590.

It should not, we submit, be open to question that the liberty thus guaranteed embraces the right to deal in wholesome food products plainly and fairly labeled. Liberty implies freedom from arbitrary restraint. And what is more palpably arbitrary than to refuse permission to deal in a wholesome food characterized by appropriate description so that there is the utter absence of any deception? It would be futile to deny the broad scope of the police power of the State, but it would be equally futile to assert that it is a power wholly unlimited. Under our constitutional system, while there is the amplest authority to afford local protection, it must appear that the legislation sought to be sustained under the police power is not merely capricious but utterly destitute of any reasonable justification. The Court does not usurp the place of the Legislature when it condemns arbitrary legislation interfering with the liberty and property of the citizen; it merely gives effect to the fundamental law as it has been construed since the Fourteenth Amendment was adopted.

The defendants rely upon *Powell* v. *Pennsylvania* (127 U. S., 678), but the decision in that

case, it is submitted, cannot be deemed controlling. Would it be said that under the *Powell* case the sale of any wholesome food could be prohibited, regardless of any question of fraud or deception? Or can it be maintained that this Court has decided that any food *product*, admittedly wholesome and properly labeled, may be condemned at the whim of the Legislature merely because it is a food product or compound? Suppose a product is composed of wheat and corn, free from impurities, admittedly wholesome and properly labeled; can a State Legislature prevent its sale? It is hardly necessary to say that such a contention, shocking to the common sense, has no support in any decision of this Court. Articles of commerce honestly made and sold are not at the legislative mercy simply because they are products, mixture or compounds, for it is plain that such a classification for the purpose of justifying legislative prohibition would be arbitrary and insensible. But if the sale of food products *per se* is not to be arbitrarily and capriciously prohibited, what is the basis of valid legislative action?

We submit that, under our constitutional system, the test of validity in connection wth legislation as to food products is not peculiar or exceptonal. The test is still the same. There must be a fair show of reason for the action. Protection of health and against imposition is the ground invoked. But if the product is admittedly wholesome there is no menace to health, and if it is sold under its appropriate label describing its ingredients, which are both pure and wholesome, there is no deception.

This is not the place to discuss public policy, but in pointing out the arbitrary character of the legislation in question, as construed

by the Court below, it is proper to refer to the necessity and importance of food products under modern economic conditions. The remarks of Mr. Justice Field many years ago upon this point are none the less pertinent and sound because they are found in a dissenting opinion (127 U. S., p. 689):

> "Upon first impressions one would suppose that it would be a matter for congratulation on the part of the State, that in the progress of science a means had been discovered by which a new article of food could be produced equally healthy and nutritious with and less expensive than one already existing and for which it could be used as a substitute. Thanks and rewards would seem to be the natural return for such a discovery, and the increase of the article by the use of the means thereby encouraged."

The decision in the *Powell* case must be considered in the light of the history of the article to which it related. It is a decision which rests upon its peculiar facts. The product in that case was oleomargarine; it was sold as "Oleomargarine Butter" (*id.* p. 681). It was an article designed to take the place of butter. When the *Powell* case was decided this was a new article about which comparatively little was known. In delivering the opinion of the Court Mr. Justice Harlan said that "many, indeed, that most kinds of oleomargarine butter in the market" might contain ingredients "that are or may become injurious to health". It was pointed out that the Court could not say "from anything of which it might take judicial cognizance" that such was not the fact. "Oleomargarine butter" was made by a process whereby beef fat—a product theretofore

consumed as a food in the form of cooked beef—was made suitable for use in eating and cooking in the same manner as butter. It was purely a manufactured product produced by a process which changed the beef fat from its natural state into a new state. "Oleomargarine butter" could be dealt with in the same manner as butter, sold by the pound over the counter, and in ordinary course of trade it would reach the consumer without distinctive and appropriate label which would guard against deception. It was this well known condition which aroused intense opposition to its introduction. When consumers ordered butter they were not sure but that they would get oleomargarine. The processes by which oleomargarine was manufactured were not well understood and the subject was one which, in the opinion of this Court, could be in such circumstances dealt with by the State legislature for the protection of the citizens of the State. We conceive that it would be a very serious thing to convert this decision, relating to a product of that description, into a general rule applicable to every food product, which, however pure and wholesome and distinctively labeled, would thus be made subject to a legislative ban in the exercise of an uncontrolled legislative will. Large investments in the production of wholesome food products properly labeled would thus be entirely outside the protection of the fundamental law. For if the Legislature has the right to enact such a prohibition, the business to which its legislation applies exists only upon legislative sufferance. When one considers the host of innocuous and wholesome food compounds in which millions of money are invested in this country, the importance of the question whether these investments are wholly outside the protec-

tion of the Fourteenth Amendment is at once perceived. And the question is not one of regulation, not one of assuring knowledge to the purchaser, not one that has any relation to the protection of health; the question is whether in such a case the legislative *fiat* is effective simply because it is a *fiat* and without other justification.

It is the contention of the appellants that the *Powell* case does not go so far and that, if it could be deemed to go so far, it could not be sustained as a sound exposition of constitutional doctrine.

In the present case that which was lacking in the *Powell* case is found to be present. The Court has a basis for the judicial knowledge which Mr. Justice Harlan in delivering the opinion in the *Powell* case found there to be non-existent. There is no question with respect to skimmed milk. That is standardized by the Federal Department. It is a well known and wholesome article, of important food value. There is no occult process involved in its production; there is nothing to create the fear of some secret mischief that may be wrought by its introduction into the human system. Skimmed milk should of course be sold as skimmed milk, and of this provision of the Ohio statute the appellants make no complaint. But it is insisted that skimmed milk may be sold and that it is the duty of this Court to take judicial notice that skimmed milk standardized by the appropriate Department as an article of commerce, is wholesome.

The cocoanut is also familiar to the Court, and cocoanut oil is a standardized product which has a definite and assured place in the Federal list of wholesome food products. With respect to

cocoanut oil, the Court is not lacking in information for it need only have recourse to the accredited reports of the Government of the United States.

"Hebe" is the compound or mixture of these two wholesome ingredients. It is a distinctive product, not to be confused with anything else. It stands, and it is entitled to stand, upon its own footing. Its wholesomeness is beyond dispute and, as the Court below said in its opinion, has been undisputed in this case. It is sold in small cans, which go directly to the consumer, with its appropriate label describing it fairly and exactly. The conditions are not at all analogous to those under which oleomargarine was sold, where, as was well known, the grocer sold from the tub to the consumer, who got that which passed for butter without anything to warn him to the contrary.

It is enough to say that, as we view it, the Court in order to sustain the Ohio statute as it has been construed must go far beyond the decision in the *Powell* case and establish a new proposition of the most serious import to vast commercial interests.

We make no question whatever of the rule, applied in *Price* v. *Illinois*, 238 U. S. 446, that where the wholesomeness of an article is debatable, the Legislature is entitled to its own view of the subject and that courts are not to take to themselves its province. That was a case with respect to the use of boric acid in a preservative, and the wholesomeness of the preservative with this content was, to say the least a matter of most serious controversy. But that rule, as the statement of it shows, only applies where there is fair ground

for debate. The Legislature cannot create a field for debate by the mere passage of a statute. In the present case the wholesomeness of the product, and of the ingredients, is beyond controversy, —so clearly beyond controversy that even in this litigation the claim to the contrary is not made.

The Court below referred to a conflict in the evidence as to whether Hebe was "*as* nutritious and *as* effective as a growth producer, and therefore as a health promoter and maintainer as the legally recognized condensed milk". And the Court said that as long as *that* question was debatable the Legislature was entitled to its own judgment. But any debate upon that point, as we conceive it, is wholly immaterial. The State has no authority to fix a dietary for its citizens. It would hardly be maintained that the State could prohibit the sale of *pears* because the Legislature might think that they were not as nutritious or "as effective as a growth producer" as *apples*. Or, if the analogy is to be limited to food products, would it be said that the Legislature could prohibit the sale of *pies* or *tarts* because it thought the children would be better without them? Or that the Legislature could interdict the sale of "*Postum*", because it thought that it would be better for the people to drink milk?

The importance of the question whether there is a reasonable field of debate, has reference to the *wholesomeness* of the article, not to the degree of its nutritious quality. If the Legislature can enter the latter field and attempt to discriminate between foods, and prohibit the sale of foods, because it thinks one food more nutritious than another, it would be easy for the Legislature, on this alleged pretext, to resort to the most invidious, arbitrary and hurtful discriminations under the

pretence of exercising the police power. We submit that the Legislature has no authority to interdict a wholesome food because it thinks some other food would better promote health.

And again let it be noted that the Ohio Legislature permits the sale of skimmed milk, sold under that name and the suggestion that in this case, the Legislature proceeded upon any supposed degrees of nutritive value, is palpably beside the mark. The Legislative, we submit, was doing nothing of the sort, and its motive, which was quite distinct from this, is not difficult to discern.

What has been said applies to the application of both the 'due process' clause and the 'equal protection' clause of the Fourteenth Amendment. The statutory prohibition as construed below, is a deprivation of property without due process of law. And it also sets up an arbitrary and therefore indefensible classification. For, granting the widest latitude in reasonable classification, there is no ground for excluding this food product from sale in Ohio, it being pure, wholesome, nutritious and properly labeled while allowing other food products, and even skimmed milk itself, to be freely sold. The statute, as we have said, should be construed as merely relating to what is sold *as* and *for* condensed milk, and not as applicable to a distinctive food product sold under its trade name and properly described. But if it be given the broad, and, as we think, the unnatural and forced construction which would make it applicable to such a product as "Hebe", it necessarily follows that the statute is without any reasonable basis of classification whatever and therefore is in conflict with the 'equal protection' clause as well as the 'due process' clause of the Fourteenth Amendment.

Nor have we any quarrel with the exercise of the regulating power of the State, even when carried to such an extremity as was shown by the legislation of North Dakota which was before this Court in *Armour & Co.* v. *North Dakota*, 240 U. S., 510, with respect to the net weight of pails of lard. In the present case the Legislature of Ohio is not prescribing that "Hebe" shall be sold in pails of a certain weight or that the label shall contain this or that description. The statute is not regulatory in any sense. As construed below, it is an absolute interdiction, and it is in that aspect that constitutionality must be determined.

The views thus advanced have abundant support, we think, in many well considered decisions.

In *People* v. *Biesecker*, 169 N. Y. 53, it was *held* that the statute there under consideration was unconstitutional because it absolutely forbade the sale of articles of food when they contained any other preservatives than those specified, even though they were not rendered unwholesome by the use of such ingredients. The Court said (pp. 56-58):

> "It is not possible to define accurately the limits of the police power, the exercise of which is vested in the legislature, nor have the courts, as a rule, essayed that task further than to state in very general terms the nature and object of such power. Still, the power has its limitations, and those limitations have been to a large extent determined by the process of exclusion and inclusion, as the courts have upheld particular cases of legislation as valid exercises of the power, and in other cases have declared the legislation void. In *People* v. *Marx*, 99 N. Y. 377, a statute absolutely prohibiting the manufacture and sale of oleomargarine or any compound as a substitute for butter and cheese was held void.

The statute having been subsequently amended so as to prohibit the manufacture or sale of any article so compounded as to imitate butter was upheld in *People* v. *Arensberg*, 105 N. Y. 123, as valid legislation to prevent fraud on purchasers and consumers. In *People* v. *Kilber*, 106 N. Y. 321, a statute defining what should be deemed unwholesome or adulterated milk and prohibiting its sale was held constitutional. In *People* v. *Girard*, 145 N. Y. 105, a statute forbidding the manufacture or sale of vinegar containing any artificial coloring matter was also held valid. From these cases the following propositions may be deduced: 1. *That the Legislature Cannot Forbid or Wholly Prevent the sale of a Wholesome Article of Food.* 2. That legislation intended and reasonably adapted to prevent an article being manufactured in imitation or semblance of a well-known article in common use and thus imposing upon consumers or purchasers is valid. 3. That in the interest of public health the legislature may declare articles of food not complying with a specified standard unwholesome and forbid their sale. Though these principles, like most legal principles, are true only within limits, there would not seem much chance of conflict in their practical application except between the first and last. In the first of the milk cases (*People* v. *Cipperly*, 101 N. Y. 634, decided upon opinion of Learned, P. J., in 37 Hun, 319), it was held that the statutory declaration of what was wholesome milk was conclusive, and the defendant was not allowed to show in defense that the milk sold by him was in fact unadulterated and not unwholesome. The first oleomargarine case can be differentiated from this on the ground that the statute forbade its sale as a substitute to *take the place* of butter and not as an unwholesome article of food. Still, that distinction is narrow and I *imagine that the sale*

and consumption of a well-known article of food or a product conclusively shown to be wholesome could not be forbidden by the legislature even though it assumed to enact the law in the interest of public health." (Last italics ours.)

In *The Toledo, Wabash and Western Railway Co.* v. *City of Jacksonville*, 67 Ill. 37-40, the court said:

> "It is not within the power of the general assembly, under the pretense of exercising the police power of the state, to enact laws not necessary to the preservation of the health and safety of the community that will be oppressive and burdensome upon the citizen. If it should prohibit that which is harmless in itself, or command that to be done, which does not tend to promote the health, safety or welfare of society, it would be an unauthorized exercise of power, and it would be the duty of the courts to declare such legislation void."

In *State* v. *Hanson*, 118 Minn. 85, the Court held unconstitutional Chapter 183, Laws of Minnesota of 1911, in so far as it prohibited the manufacture or sale of oleomargarine of a shade or tint of yellow, no artificial color matter being used, such shade or tint being produced by natural and essential ingredients which are not deleterious or injurious to health. The opinion of the Court is in part as follows:

> "It is in fact conceded that the legislature had no right to prohibit the manufacture of oleomargarine. It being a wholesome article of food, a statute prohibiting its manufacture or sale cannot be upheld. * * * Considering that the direct and necessary results of the statute is to prohibit at least 90 per cent. of the manufacture and sale of a wholesome article of food, it cannot save the law

> that it was enacted under the pretense of regulation. * * * Our conclusion is that, if construed as we think it must be, Section 1 of the law in question is invalid, because it amounts to a prohibition of the manufacture and sale of a wholesome article of food."

In *Ex parte Hayden*, 147 Cal. 649, the validity of a law which required all fruit to be labeled to show the locality where same was grown was under consideration, and the Court in holding the law void said:

> "It is a matter of common knowledge that this requirement would work the absolute destruction of certain important branches of industry. Dried fruit, such as prunes, peaches and apricots, are gathered in establishments in enormous quantities from the state over. These fruits when dried are assorted by grade and quality, and thus assorted and packed are shipped to the uppermost parts of the earth. It would absolutely prohibit this industry if these fruit-driers were compelled to label each package with the names of the localities from which the fruit came, and if it did not absolutely prohibit it, it would render their business so onerous, complicated, and expensive as seriously to imperil its existence. It is plain therefore, that the act was not designed to prevent either false labeling or the shipping of diseased fruit, and, if so designed, it is both meaningless for this purpose and burdensome for all others. It seems quite apparent that the true purpose of the act was to obtain for the fruit-raisers of some well-advertised and favored localities an advantage in the disposition of their own fruit. But this, for reasons well and elaborately set forth in People *v.* Hawkins, 157 N. Y. 1, (68 AM. St. Rep. 736, 51 N. E. 257), forms no part of the police power, and is wholly beyond the prerogative of the legislature.

"It follows, therefore, that the act in question works an unconstitutional invasion of the prisoner's liberty and it is ordered that he be discharged."

In *Rigbers* v. *City of Atlanta*, 7 Ga. App. 411, the Court said:

"It will be noticed that under this ordinance the prohibition is not against selling ice cream of less than the prescribed percentage as ice cream, *but against selling it at all.* Though the seller distinctly informs the purchaser that the ice cream contains less butter fats than 10 per cent., the sale is unlawful according to the ordinance. Even if the city has the power to prescribe that no ice cream of less than a certain percentage of richness in butter fats shall be sold *as standard ice cream*, it still would not have the power to say that ice cream below that standard should not be sold at all. For instance, it might be permissible to say that the term 'ice cream,' 'standard ice cream,' or 'first-class ice cream' should relate only to ice cream of a certain prescribed richness, and that whoever sold ice cream of poorer quality should, either by calling it under some other name, or by indicating on the vessel in which it is delivered or otherwise, disclose the inferiority of its quality. But under the ordinance before us, if a physician desired that a patient should have ice cream, but did not deem it safe for him to take the richer ice cream, it would be illegal for anyone to furnish the grade of ice cream actually suited to the sick man's physical condition.

"The court is willing to give every encouragement within legitimate bounds to the public authorities in their laudable effort to protect the public not only against unsanitary food products, but also against adulteration, frauds, and impositions in the sale of food

> products, and where the question is doubtful, the doubt will be solved in favor of the regulation; but to say that in a city the size of Atlanta no one shall under any circumstances, or for any purpose, sell any ice cream containing less than 10 (ten) per cent. butter fats is so unreasonable that the ordinance cannot be upheld, where the city's power to pass it rests solely upon the authority of the general welfare clause of its charter."

In *Dorsey* v. *Texas*, 38 Tex. Crim. Rep. 527, 40 L. R. A. (Tex. Ct. App.) 201, appellant had been convicted of offering for sale an article of food consisting of a mixture of 90 per cent of flour and 10 per cent of corn meal under a statute providing that food is held adulterated "if any inferior or cheaper substance or substances have been substituted, wholly or in part, for the article." The court said:

> "The courts have gone to great length in upholding legislation under the police power. In some decisions it has been so magnified as to be regarded as almost omnipotent. We do not agree to the doctrine that under this power, or any other, the legislature can make criminal the mixture or mingling of articles of food which are wholesome and nutritious, and prohibit the sale thereof. * * * The prosecution is attempted to be maintained under the general act to prohibit the intermixing of all foods. We do not believe that it was competent for the legislature to do this. The judgment is reversed, and the prosecution ordered dismissed."

In *People* v. *Excelsior Bottling Works, Inc.*, 184 App. Div. (N. Y.) 45, the question related to the use of saccharin in bottled soda and the Court held that since saccharin was not injurious to health its use might be regulated but could not be prohibited. The Court said (pp. 51-52):

"Moreover, since saccharin is not injurious to health, its use may be regulated but cannot be prohibited under the exercise of the police power, and, therefore, I think the resolution was void. *People* v. *Biesecker*, 169 N. Y. 53; *People* v. *Arensberg*, 103 *id.* 388; *People* v. *Marx*, 99 *id.* 377; *People* v. *Bowen*, 182 *id.* 1, 10; *Curtice Bros. Co.* v. *Barnard*, 209 *Fed.* Rep. 589; *State* v. *Hanson*, 118 Minn. 85; 40 L. R. A. (N. S.) 865. See, also, *Waite* v. *Macy*, 246 U. S. 606. If a *standard* of purity or with respect to the ingredients to be used in making soda water had been prescribed by the Legislature or by legislative authority, then it might well be argued that no other ingredients could lawfully be used in making it. (See dissenting opinion of *Learned*, P. J., in *People* v. *Cipperly*, 37 Hun, 324, on which the decision was reversed, 101 N. Y. 634.) It is perfectly obvious that entirely aside from the question of disease or medical advice some people may desire, especially in hot weather, a cooling beverage that contains no food value or that has been sweetened to render it palatable by the use of saccharin instead of by the use of sugar, and there is, therefore, no occasion or authority for prohibiting such use of saccharin.

"It follows that the conviction should be reversed and the information dismissed."

See also *Waite* v. *Macy*, 246 U. S. 606.

IV.

THE DECREE SHOULD BE REVERSED AND THE CAUSE REMANDED WITH DIRECTION TO ENTER A DECREE IN ACCORDANCE WITH THE PRAYER OF THE BILL OF COMPLAINT.

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Appendix A.

ALABAMA.

Sub-Section 13 of Section 572 of the Code of Alabama, which Section was enacted August 26, 1909, makes it the duty of the Commissioner of Agriculture and Industries to fix the standards of purity for all food and drug products in accordance with those promulgated by the Secretary of Agriculture, the Secretary of the Treasury, and the Secretary of Commerce and Labor, of the United States, when such standards are not fixed by such Act.

No standards for milk are fixed by such Act.

In a bulletin issued by the Department of Agriculture of Alabama entitled "Food and Drug Laws Regulations Governing Enforcement and Standards," Serial No. 49, January 1, 1912, the following "Standards," are established:

> "*Skim milk* is milk from which a part or all of the cream has been removed, and contains not less than nine and one-quarter (9.25) per cent. of milk solids." (P. 40.)
>
> "*Condensed skim milk* is skim milk from which a considerable portion of water has been evaporated." (P. 40.)
>
> "*Cocoanut oil* is the oil obtained from the kernels of the cocoanut (Cocos nucifera L.) and subjected to the usual refining processes and free from rancidity." (P. 62.)

ARIZONA.

Section 4431, Chapter 3 of Title 41, Revised Statutes of Arizona for 1913, reads as follows:

> "The standard of purity of food and liquor shall be that proclaimed by the Secretary of the United States Department of Agriculture."

CALIFORNIA.

Section 3 of the Pure Foods Act, approved March 11, 1907, as amended 1909, 1911 and 1915, reads as follows:

> "Sec. 3. The standard of purity of food and liquor shall be that proclaimed by the Secretary of the United States Department of Agriculture."

Chapter 93 of the Laws of 1915 provides for a State laboratory for examining foods and to advise the "state board of control" concerning the standard of purity and other matters relating to food. The Act also provides for a guaranty by dealers of food. A guaranty as to compliance with National standards is not sufficient if a higher standard is established under the above Act. In a booklet entitled "Pure Foods and Drugs Acts, Food Sanitation Act, Cold Storage Act with Rules and Regulations," published by the California State Board of Health, October 1, 1916, under the title "Standards of Purity," among the standards set up are the following:

> "*Condensed skim milk* is skim milk from which a considerable portion of water has been evaporated, and contains not less than eighteen per cent of milk solids." (P. 38.)
>
> "*Cocoanut oil* is the oil obtained from the kernels of the cocoanut (Cocos nucifera L.) and subjected to the usual refining processes and free from rancidity." (P. 50.)

FLORIDA.

Section 13, Chapter 5662, Acts of 1907, as amended by Section 15, Chapter 6122, Acts of 1911, and Section 15, Chapter 6541, Acts of 1913 (Section 1143 l., Compiled Statutes, West Publishing Company, 1914) adopts for Florida the definitions and standards of foods and drugs established

under the Federal Pure Food and Drugs Act and makes it the duty of the State Commissioner of Agriculture, with the advice of the State Chemist, to establish rules and regulations in conformity thereto.

In a pamphlet published July, 1913, by the Department of Agriculture of the State of Florida, entitled "Standards of Purity for Food Products," among the standards set forth are the following:

> "*Skim milk* is milk from which a part or all of the cream has been removed and contains not less than nine and one-quarter (9.25) per cent. of milk solids." (P. 7.)
>
> "*Condensed skim milk* is skim milk from which a considerable portion of water has been evaporated." (P. 8.)
>
> "*Cocoanut oil* (a) is the oil obtained from the kernels of the cocoanut (Cocos nucifera L.) and subjected to the usual refining processes and free from rancidity." (P. 25.)

GEORGIA.

Section 21 of the Food and Drug Act of Georgia, enacted August 21, 1906, (Section 2115, Park's Annotated Code of Georgia, 1914) makes it the duty of the Commissioner of Agriculture and the State Chemist to fix standards for food products where the same are not fixed by the Chapter of which such Section is a part, in accordance with those promulgated by the Secretary of Agriculture, the Secretary of the Treasury, and the Secretary of Commerce and Labor of the United States. No standard is fixed in such Chapter for milk, milk products or cocoanut oil.

In a pamphlet, Serial No. 50, Bulletin Georgia Department of Agriculture, published under the supervision of the Commissioner of Agriculture

of Georgia in 1911, the following "Food Standards" are set forth:

> "*Skim milk* is milk from which a part or all of the cream has been removed, and contains not less than nine and one-quarter (9.25) per cent. of milk solids." (P. 48.)
>
> "*Condensed skim milk* is skim milk from which a considerable portion of water has been evaporated." (P. 48.)
>
> "*Cocoanut oil* is the oil obtained from the kernels of the cocoanut (Cocos nucifera L.) and subjected to the usual refining processes and free from rancidity." (P. 72.)

IDAHO.

Chapter 196 of the Laws of 1911 adopts for Idaho the standards for food, liquors, drugs and strong drinks which have been promulgated by the Secretary of Agriculture of the United States.

ILLINOIS.

Section 39 of the Act of May 14, 1907, p. 543, (Paragraph 10778 of Jones & Addington's Illinois Statutes Annotated, 1913) defines standards for certain articles of food and provides that all other articles of food offered for sale or sold shall conform to requirements as to standards adopted from time to time by State Food Standard Commission. No standard for skimmed milk, condensed skimmed milk or cocoanut oil is prescribed in said statute.

In a legal notice published in the Chicago Daily Tribune, January 14, 1914, by the Illinois State Food Standard Commission, among the "Standards for Food Products" therein set forth are the following:

> "*Skim milk* is milk from which a part or all of the cream has been removed, and contains not less than nine and one-quarter (9.25) per cent of milk solids."

"*Condensed skim milk* is skim milk from which a considerable portion of water has been evaporated."

"*Cocoanut Oil* is the oil obtained from the kernels of the cocoanut (Cocos Nucifera L.) and subjected to the usual refining processes and free from rancidity."

INDIANA.

Sub-division 7 of the Acts of 1907, page 153 (Section 7644, Burns' Annotated Statutes of Indiana) authorize the State Board of Health to adopt minimum standards of food. In a pamphlet entitled "'Book of Instructions to Health Authorities," published by the Indiana State Board of Health, among the "Rules" of said Board of Health regulating minimum standards for food and drugs are the following:

"*Skimmed milk* is milk from which a part or all of the cream has been removed and contains not less than nine and one-quarter (9.25) per cent. of milk solids" (p. 62).

"*Condensed skim milk* is skim milk from which a considerable portion of water has been evaporated" (p. 62).

"*Cocoanut oil* is the oil obtained from the kernels of the cocoanut (Cocos nucifera L.) and subjected to the usual refining processes and free from rancidity" (p. 79).

KANSAS.

Chapter 266 of the Laws of 1907, Section 14, as amended by Laws of 1909, Chapter 184, Section 5, adopts the Federal standards of food and drugs until other standards are prescribed by the State Board of Health, and provides that such State standards when adopted supersede the Federal standards. In a pamphlet published by the Kansas Board of Health entitled "Kansas Food and

Drugs Law, and Rules and Regulations," May, 1911, among the "Food Standards" are the following:

"*Skim Milk* is milk from which a part or all of the cream has been removed, and contains not less than nine and a quarter (9.25) per cent of milk solids" (p. 25).

"*Condensed Skim Milk* is skim milk from which a considerable portion of water has been evaporated" (p. 25).

Cocoanut Oil is the oil obtained from the kernels of the cocoanut (*Cocos nucifera* L.) and subjected to the usual refining processes and free from rancidity" (p. 40).

KENTUCKY.

Chapter 53a, Act of March 13, 1908 (Sub-section 8 of Section 1905a, Carroll's Kentucky Statutes, 1915), authorizes the Director of Agricultural Experiment Station to adopt standards of purity, quality and strength for foods when such standards are necessary or are not specified or fixed by statute. Among the "Food Standards" contained in a pamphlet published by the Kentucky Agricultural Experiment Station and stated on the cover of said pamphlet to be "Standards Fixed for Guidance in the Enforcement of the Kentucky Food and Drug Law in Accordance with Section 8 thereof" are the following:

"*Skim milk* is milk from which a part or all of the cream has been removed, and contains not less than nine and one-quarter (9.25) per cent of milk solids" (p. 6).

"*Condensed skim milk* is skim milk from which a considerable portion of water has been evaporated" (p. 6).

"*Cocoanut oil* is the oil obtained from the kernels of the cocoanut (*Cocos nucifera* L.) and subjected to the usual refining processes and free from rancidity" (p. 20).

LOUISIANA.

Sections 3 and 4 of Act 282, Laws of 1914, p. 567 (Paragraph 692 Marr's Annotated Revised Statutes of Louisiana), provides for examination of specimens of foods and drugs by State Board of Health to determine whether such articles are adulterated or misbranded within the meaning of such Act and authorizes such Board to make uniform rules and regulations for carrying out the purposes of the Act.

Regulation 24 set forth in a pamphlet issued in 1915 entitled "The Food and Drug Regulations of the State of Louisiana, adopted by the Louisiana State Board of Health", reads as follows (p. 16):

> "Excepting specific laws passed by the Legislature of the State of Louisiana, and excepting all regulations in the Sanitary Code of the State of Louisiana, and excepting such regulations on poisons and habit-forming drugs and sanitary matters as may be put into the Sanitary Code of the State of Louisiana, all food and drug standards and decisions made by the United States Government or its authorized officials shall be official, and are hereby adopted by the Louisiana State Board of Health as its standards."

No standards for skimmed milk, condensed skimmed milk or cocoanut oil are prescribed in any statute of Louisiana.

MASSACHUSETTS.

Section 1, Acts of 1911, Chapter 610 as amended by Acts of 1912, Chapter 474, requires every container of condensed milk or condensed skimmed milk to have labeled thereon or attached thereto a formula for extending such milk with water.

The formula shall be such that the resulting milk product is not below the minimum standard for whole milk if such article is condensed milk or for skimmed milk if such article is condensed skimmed milk.

Section 55, Revised Statutes, provides for the punishment of any person selling skimmed milk containing less than nine and three-tenths (9.3) per cent milk solids exclusive of fats.

MICHIGAN.

Act 64, Laws of 1913, Section 1, adopts the Federal statutes for purity of foods as the standards for Michigan except in cases where other standards are prescribed by the Laws of Michigan. Act 176, Laws of 1913, requires every container of condensed milk to have labeled thereon or attached thereto a formula for extending such milk with water. The formula shall be such that the resulting milk product is not below the Michigan standard for whole milk or the Michigan standard for skimmed milk if such article is condensed skimmed milk. Section 12, Act of June 29, 1889, Act 219 (Section 3251 Howell's Michigan Statutes 1913) requires skimmed milk to have a specific gravity at 60 degrees Fahrenheit not less than 1.032 and not more than 1.037.

MINNESOTA.

In a pamphlet issued by the Dairy and Food Commissioner of Minnesota, entitled "Manual of the Dairy and Food Laws and Rules and Regulations", 1913, at page 88 thereof the following is among the general regulations and standards therein contained:

> "*Condensed Skim Milk*, is skim milk from which a considerable portion of water has

been evaporated and of which sugar (sucrose) may or may not have been added. The name and address of the manufacturer or jobber shall appear upon the label."

Section 3645, General Statutes Minnesota, 1913, states that, notwithstanding the provisions of Section 3644, General Statutes of Minnesota, 1913, prescribing standards for milk products, the sale of skim milk is expressly permitted by licensed dealers.

MISSISSIPPI.

Section 6, Chapter 132, Acts of 1910, makes it the duty of the State Chemist to fix and publish the Federal standards of purity of food as the standards for Mississippi.

MISSOURI.

By Section 4 of an Act approved March 15, 1907, food is declared to be adulterated:

"10. If it does not conform to the standard of strength, quality and purity now or hereafter to be established by the United States Department of Agriculture".

Among the "definitions and standards" of purity for dairy products established by an Act approved June 14, 1909, Section 9, are the following:

"Skim milk is milk from which a part or all of the cream has been removed and contains not less than nine and one-quarter (9.25) per cent of milk solids, not less than eight and one-half (8.5) per cent of milk solids not fat".

"Condensed skim milk is skim milk from which a considerable portion of water has been evaporated".

In a pamphlet published by the Missouri Department of Food and Drug Inspection, January

1, 1910, under the heading "Food Standards", on page 79, the Federal standard for cocoanut oil is set forth.

NEVADA.

Subdivision 3 of Section 3488, Revised Laws of Nevada, 1912, being Section 3 of the Food and Drug Inspection Act approved March 13, 1909, reads as follows:

> "The standard of purity of foods, drugs and liquors shall be that proclaimed by the Secretary of the United States Department of Agriculture."

NEW HAMPSHIRE.

Section 17, Chapter 127, Public Statutes, reads as follows:

> "* * * If upon analysis any milk shall be found to contain less than twelve per cent. of milk solids, or in the case of skim milk, less than eight and one-half per cent. of milk solids, exclusive of fat, * * * such products shall not be deemed as of standard quality; * * *."

Section 9, Chapter 269 of the Public Statutes, and Section 7 of an Act approved March 7, 1907, confer upon the State Board of Health authority to promulgate rules and regulations to secure pure foods.

In a pamphlet containing the rules and regulations for the enforcement of the Food and Drug Laws of the State of New Hampshire, published by the State Board of Health in 1912, the following regulation is set forth at page 46:

> "*Regulation 37. Standards of Purity for Food Products.*
>
> "Where not otherwise provided, the standards of purity for food products shall be those adopted and in use by the United States Department of Argiculture."

NEW JERSEY.

Chapter 217, Laws of 1907, Section 28, permits the State Board of Health to adopt for any food whose standard has not been fixed by any law of New Jersey the standard of purity, quality or strength established and published by the Secretary of the Department of Agriculture of the United States. In a pamphlet published by the Board of Health of the State of New Jersey in 1910, under the heading "Food Standards", are the following regulations:

> "*Skim milk* is milk from which a part or all of the cream has been removed and contains not less than nine and one-quarter (9.25) per cent. of milk solids." (p. 43).
>
> "*Condensed skim milk* is skim milk from which a considerable portion of water has been evaporated." (p. 43).
>
> "*Coconut oil* is the oil obtained from the kernels of the coconut (Cocos nucifera L.) and subjected to the usual refining processes and free from rancidity." (p. 54).

Section 47, Compiled Statutes, First Supplement, page 71, recognizes and regulates the sale of condensed skimmed milk and provides that such milk must be sold in labeled cans and must not violate the Pure Food Law of the State.

OKLAHOMA.

Article 1, Chapter 18, Laws of 1909, known as the Oklahoma Food and Drug Law, Section 4, reads as follows:

> "The standard of purity of foods, drugs and liquors shall be that proclaimed by the Secretary of the United States Department of Agriculture."

In a pamphlet published by the Oklahoma State Health Department, July 1, 1911, under the heading "Food Standards", are the following regulations:

"Skim milk is milk from which a part or all of the cream has been removed, and contains not less than nine and one-quarter (9.25) per cent of milk solids." (p. 28).

"Condensed skim milk is skim milk from which a considerable portion of water has been evaporated." (p. 28).

"Coconut oil is the oil obtained from the kernels of the coconut (Cocos nucifera L.) and subjected to the usual refining processes and free from rancidity." (p. 42).

RHODE ISLAND.

Under the provisions of Section 12 of Chapter 1597 of the Laws of 1908 it is the duty of the Board of Food and Drug Commissioners to adopt minimum standards of strength, purity and quality for foods. Said section contains the further provision that such rules and standards shall not be more stringent than, nor conflict with, the rules and standards adopted or which may thereafter be adopted for the enforcement of the Federal Pure Food and Drugs Act.

In a pamphlet issued by the Board of Food and Drug Commissioners in 1908 under the heading of "Rules Regulating Minimum Standards of Purity for Food and Drugs, and Defining Specific Adulterations" are contained the following regulations:

"*Condensed skim milk* is skim milk from which a considerable portion of water has been evaporated" (p. 14).

"*Cocoanut oil* is the oil obtained from the kernels of the cocoanut (*Cocos nucifera L.*) and subjected to the usual refining processes and free from rancidity" (p. 33).

TEXAS.

In the Fourth Annual Report of the Dairy and Food Commissioner of Texas, August 31, 1911,

the following "Food Standards", prescribed under authority of Section 16, Chapter 47, Laws of 1911, are set forth:

"*Skim milk* is milk from which a part or all of the cream has been removed and contains not less than nine and one-quarter (9.25) per cent of milk solids" (p. 49).

"*Condensed skim milk* is skim milk from which a considerable portion of water has been evaporated" (p. 49).

"*Cocoanut oil* is the oil obtained from the kernels of the cocoanut (*cocos nucifera L.*) and subjected to the usual refining processes and free from rancidity" (p. 58).

UTAH.

Sections 742 and 743 of the Compiled Laws of Utah, 1907, regulate the sale of skim milk and provide that such skim milk must contain nine per cent of milk solids exclusive of fats.

VERMONT.

Section 5476, of Chapter 226, of the Public Statutes of Vermont, being the Food and Drugs Act, authorizes the State Board of Health to adopt rules and regulations to facilitate the enforcement of the provisions of said Chapter. Among the "Rules and Regulations" adopted by such Board for the enforcement of said law as contained in a pamphlet published in 1914 under the authority of said Board, are the following:

"*Skim milk* is milk from which a part or all of the cream has been removed and contains not less than nine and one-quarter (9.25) per cent of milk solids" (p. 33).

"*Condensed skim milk* is skim milk from which a considerable portion of water has been evaporated" (p. 34).

"*Cocoanut oil* is the oil obtained from the kernels of the cocoanut (*Cocos nucifera L.*)

and subjected to the usual refining processes and free from rancidity" (p. 49).

WISCONSIN.

Section 4601—4a of the Dairy and Food Laws of Wisconsin reads as follows:

"*Food products; definitions; standards.* Section 4601—4a. In all prosecutions arising under the provisions of these statutes relating to the manufacture or sale of an adulterated, misbranded or otherwise unlawful article of food, the following definitions and standards for food products shall be the legal definitions and standards, to wit:"

* * * * * * *

(5) * * *

"Skim milk is milk from which a part or all of the cream has been removed, and contains not less than nine percent of milk solids."

* * * * * * *

"Condensed skim milk is skim milk from which a considerable portion of water has been evaporated."

* * * * * * *

"Cocoanut oil is the oil obtained from kernels of the cocoanut (Cocos nucifera L.) and subjected to the usual refining processes and free from rancidity."

WYOMING.

Section 5, Chapter 107, Laws of 1913, authorizes the Dairy Food and Oil Commissioner to adopt the standard of purity for foods as laid down by the United States Department of Agriculture and to promulgate and enforce the necessary rules and regulations. In a pamphlet published under the authority of the said Commissioner in 1913, among the "Standards of Purity for Food Products" therein contained are the following:

"*Skimmed milk* is milk from which a part or all of the cream has been removed and con-

tains not less than nine and one-quarter (9.25) per cent. of milk solids" (pp. 37-38).

"*Condensed skim milk* is skim milk from which a considerable portion of water has been evaporated" (p. 38).

"*Cocoanut oil* is the oil obtained from the kernels of the cocoanut (Cocos nucifera L.) and subjected to the usual refining processes and free from rancidity" (p. 58).